89-1306

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSTRUCTION ENGINEERS, INC.,
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, ARKANSAS CHAPTER, MICHAEL
SUTTERFIELD AND CATHERINE N. RUSHING,

Petitioners

v.

THE CONWAY CORPORATION,
JIM BREWER AND BENNIE J. MCCOY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Arkansas deny petitioners a fair trial by relying upon proffers of proof of respondents as evidence in the case to support new fact findings and reverse the trial court's holding and dismiss the case?

2. Did the Arkansas Supreme Court deny petitioner its constitutional right to fair trial and legal representation by accepting proffers of proof as evidence when the proffers were made after conclusion of the trial and without right to object or cross examine?

PARTIES TO THE PROCEEDINGS

Construction Engineers, Inc.—Petitioner

Associated General Contractors of America, Arkansas Chapter

Michael Sutterfield and Catherine N. Rushing

The Conway Corporation—Respondent

James Brewer

Bennie J. McCoy

John Doe I, John Doe II

Larry Grady

Frank Robins, III

Lou Gardy

Bill Pate

Bob Clifton

Leo Crafton, III

Arkansas Water Managers Association

Petitioners believe that Respondents M. D. Limbaugh Construction Company, John Doe, I, John Doe, II, Larry Graddy, Frank Robins, III, Lou Gardy, Bill Pate, Bob Clifton, as members of the Board of Directors of the Conway Corporation, and Arkansas Water Managers Association have no personal interest in the outcome of this petition. They were parties to injunctive relief and to issues no longer present and not subject to this petition for writ.

Designation of Corporate Relationships—Construction Engineers, Inc., filing this Petition for Certiorari as appellant in this proceeding states that: This is its original Designation of Corporate Relationships. Construction Engineers, Inc., is not owned by any parent corporation. Construction Engineers, Inc., does not have an ownership interest in any subsidiaries. Construction Engineers, Inc., does not have any affiliates. Dated February 7, 1990.

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Conway Corporation, et al., v. Construction Engineers, Inc., Pulaski County Chancery Court, First Division, The Honorable Lee Munson, Pulaski Chancery No. 3687, July 22, 1988.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is founded upon a denial by the Arkansas Supreme Court of petitioner's right to fair trial. Said Court is the highest court of the State. The date of the judgment or decree, being a substituted opinion, is December 11, 1989. It is the Court's opinion on rehearing from a decision rendered on October 30, 1989. It is the action of the Arkansas Supreme Court in determining a case *de novo* on appeal that gave rise to the denial of constitutional

rights. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section,

any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In an appeal before the Arkansas Supreme Court from a decision of a chancery court, the Arkansas Supreme Court considered a written proffer of proof, a document not presented at the hearing before the chancellor, as evidence in the case on appeal. The court also considered as evidence a proffer made during trial, without right to cross-examine or object. Because the appeal was from a chancery court, the Arkansas court considered the case *de novo*, accepted the proffers of proof as evidence and reversed the chancellor and dismissed the case. A Petition for Rehearing was filed asserting the Arkansas Supreme Court's action violated Petitioner Construction Engineers, Inc.'s (CEI) right to fair trial as protected by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §1983. The other petitioners joined in that petition. On consideration of the petitions for rehearing, the Arkansas court entered a substituted opinion which also reversed and dismissed. In the substituted opinion the court states it is not clear " . . . whether we may consider these proffered affidavits in our *de novo* review, but we will not do so here." In fact, the substituted opinion does rely upon the proffers of proof and cites facts to support

the court's action which appear only in the proffer or which came from the proffers.

Background

Petitioner CEI, the low bidder on a construction contract to improve a publicly owned water treatment plant, sued to enjoin the awarding of the contract to other than the low bidder or, in the alternative, for damages. The defendants were the Conway Corporation, a non-profit corporation which, under contract, operates utilities owned by the city of Conway; the corporation's directors; James Brewer, the general manager of the Conway Corporation; and Bennie J. McCoy, the engineer for the Conway Corporation for this construction project. Associated General Contractors of America, Arkansas Chapter was permitted to intervene as a full party on the side of Petitioner in order to protect industry rights. Michael Sutterfield and Catherine N. Rushing were permitted to intervene as full parties as taxpayers and ratepayers to recover wasted construction funds by use of second-low bid for the construction project and to protect future ratepayer rights. In a bifurcated trial, the chancellor determined, following the liability portion of the trial, the defendants were in fact liable, an injunction should not issue and the matter should be set for trial on damages. Included in the chancellor's fact findings were findings of bad faith on the part of Conway Corporation, its manager Brewer and its engineer McCoy, which findings were

relevant to issues of lack of good faith to reject the low bidder and to tortious interference with business expectancy. At the subsequently held trial on damages, the chancellor determined damages in the amount of $194,295.00. After conclusion of the trial on damages and some two or three weeks later, defendants, Conway Corporation and Jim Brewer, among others, submitted a proffer of proof with multiple parts on the issue of liability, such proffer being by letter containing the proffers sent to the chancery clerk's office and to counsel.

In its first opinion reversing the chancellor and dismissing the case, the court stated:

> Some of the evidence referred to was not presented at the hearing before the chancellor, but was proffered at a later time. There was some confusion over the subject matter of the hearing, and the appellants understandably thought it concerned injunctive relief only. In fact, the chancellor excused appellant McCoy from the hearing, saying the issue of his liability would not be reached. When the chancellor ruled against the appellants on the issue of liability for damages, they proffered additional evidence. Appellate review of equity cases is *de novo* and properly excluded evidence may be considered. *McCoy Farms, Inc. v. J & M McKee*, 263 Ark. 20, 563 S.W.2d 409, *cert. den.*, 439 U.S. 862 (1978).

Although the Court mentions confusion about the nature of the liability trial regarding McCoy, it is not the proffer of McCoy that the court relied upon. Rather it is the proffer of Conway Corporation, James Brewer and the other defendants which the court treated as evidence on appeal.

After considering the petition for rehearing the court indicates in its substituted opinion, it is not relying upon the proffer. However, it clearly continues to do so. In its substituted opinion, the court states three factors which it felt were crucial to the chancellor's decision. The first was the finding that engineer McCoy's investigation was cursory and biased, that negative information had been solicited and the credibility findings against the witness. The second factor said to be crucial in the chancellor's finding was the chancellor's finding that CEI had done prior satisfactory work for Conway Corporation. The finding was significant because not only had the chancellor found a prior satisfactorily performed construction project for Conway Corporation, it was upon the same water treatment plant as was under litigation and had followed the time CEI had constructed a school building some years earlier and had encountered difficulties which defendants were relying upon to justify not using CEI on the project. The third factor said to be crucial was the general manager had decided, even before bids were open, not to award the contract to CEI.

In demonstrating what the Arkansas Supreme Court found to be clear error on the part of the chancellor, the Arkansas court stated with regard to the second factor enumerated as crucial to the chancellor's finding, that CEI was only a sub-contractor on that construction project.

Specifically, the Court stated:

> One job involved the same water treatment plant, but did not require CEI to perform as a general contractor, only a subcontractor on a job costing less than $35,000.00.

The support for the Arkansas court's findings is the proffer of proof, the particular portion being testimony that defendant Brewer would supposedly testify to as follows: " . . . It [CEI] was more in the posture of a subcontractor on this project, since the Conway Corporation was functioning as its own general contractor." [Bracketed material added.] The proffer thus became evidence to demonstrate the chancellor's finding was clearly erroneous. The testimony in the record does not support the finding, but contradicts it.

In discussing the first factor which was said to be crucial to the chancellor's finding, which deals with the investigation of engineer McCoy, the court defends the credibility of the engineer's notes with which he had been impeached and states: "It is also important that the

notes containing the information were written by McCoy for his own personal use in preparing for a deposition in the case." No testimony appears in the record to support this finding. Neither does any statement appear in the proffers of proof to support the finding.

In its general findings, the Arkansas court found that "According to Brewer's information . . ." there had been serious problems with the school CEI had built in 1981-1982 including problems with plumbing, cabinet work and windows as a result of faulty construction. These matters are set forth in the portion of the proffer which contains additional statements Brewer would relate if allowed to testify further in the matter. The statements are absent from the record and the abstract of Brewer's testimony, which abstract was prepared by counsel for the Conway Corporation, Brewer, McCoy and the other defendants. It is obvious the proffers of proof, originally relied upon by the Arkansas court, are still being relied upon by that court and are having a direct effect upon its decision in the case.

As part of its general findings, the Arkansas Supreme Court found that the board of Conway Corporation was concerned with the ability of CEI to complete the project: "After hearing Brewer's information and recommendations, the members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI."

None of the board members presented at trial so testified. A review of the abstract of their testimony and the record does not support the court's finding. However, while the portion of the proffer of proof containing additional testimony Jim Brewer would allegedly testify to, does not directly in its language support the fact finding of the Arkansas court, the fair inference from the proffer of proof does support the fact finding. It demonstrates that the proffer of proof is in fact appearing throughout the court's opinion, although a direct quotation from the proffer cannot always be found.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

REASONS FOR GRANTING THE WRIT

1. Did the Supreme Court of Arkansas deny petitioners a fair trial by relying upon proffers of proof of respondents as evidence in the case to

support new fact findings and reverse the trial court's holding and dismiss the case?

2. Did the Arkansas Supreme Court deny petitioner its constitutional right to fair trial and to legal representation by accepting proffers of proof as evidence when the proffers were made after conclusion of the trial and without right to object or cross examine?

Petitioners were denied the right to a fair trial by the Arkansas Supreme Court's action reversing and dismissing petitioners' causes of action, after trial *de novo*, with the court's action being based upon proffered testimony. No opportunity to object to inadmissible testimony or for cross examination existed as to proffered testimony. The court thus prevented CEI and petitioners from cross examining witnesses, and from having the opportunity to object to inadmissible testimony. Petitioners were denied their right to effective counsel by the lack of opportunity to object, to cross examine, or participate in any manner with regard to matters proffered below and then relied upon by the court. These rights are fundamental rights which are protected by the Fourteenth Amendment and 42 U.S.C. §1983. Denial of these rights is a denial of both substantive and procedural due profess rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 1187 (1905)

(fundamental requirement of due process is opportunity to be heard at meaningful time and meaningful manner); *Adington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (function of legal process is to minimize risk of erroneous decisions); *Council of Federal Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964) (right of litigant to be heard is one of fundamental rights of due process); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436 (3d Cir. 1965) (denial of right of cross examination of available witness deprives litigant of due process); *Ellis v. Capps*, 500 F.2d 225 (5th Cir. 1974) (denial of right of inquiry such as bias and prejudice of party is repugnant to principle of fair trial); *See, U.S. v. Dinitz*, 538 F.2d 12.4 (5th Cir. 1976), *cert. den.* 429 U.S. 1104, 77 S.Ct. 1133, 51 L.Ed.2d 556 (1977) (refusal to hear party by counsel in civil or criminal case constitutes denial of a hearing and therefore due process); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961), *cert. den.* 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 1981 (preparation of court's opinion by litigant's counsel without notice to opposing side amounts to denial of due process); *Bagby v. Beal*, 439 F.Supp. 1257 (M.D. Pa. 1977), *vac. as moot*, 606 F.2d 411 (3d Cir. 1979) (due process includes a reasonable opportunity to be heard, including a statutory scheme which is intelligible to persons affected by it.)

The proffered testimony of respondents, Conway Corporation, Jim Brewer and all defendants except McCoy consisted of several written statements of

different people, some of whom had testified in the case. Only the proffered testimony of Dan Nabholz was tendered during trial and that proffer on liability occurred during the damage portion of a bifurcated trial. No opportunity to cross examine or object to inadmissible testimony was given because only a proffer was being made. During the trial to determine liability, respondents Conway Corporation and James Brewer participated fully. Upon concluding their defense on liability, these respondents rested. The trial court ruled on the liability issue. Only after having the opportunity to know the basis for the liability ruling of the trial court, an opportunity to see after the fact what issues might be deemed most significant, did respondents Conway Corporation and Jim Brewer proffer the testimony of Dan Nabholz and the written proffer consisting of affidavits relied upon by the Arkansas Supreme Court. It should be noted that the proffer of all respondents except McCoy were presented **after all** testimony in the **entire trial** was concluded. The Arkansas Supreme Court's allowance of this untimely evidence and reliance upon it without permitting cross examination, or the right to object, and to the exclusion of the trial testimony, deprived petitioners of the fundamental right to a fair trial.

Because the proffer was untimely, and because it was by proffer, and because all testimony was concluded and the proffers were not presented until the trial was concluded, there was no opportunity for cross

examination, for objection such as to hearsay, or for any participation by counsel for petitioners. Because the Arkansas Supreme Court now credits this proffered testimony, these omissions seriously prejudice petitioners' right to a fair trial. For example, the proffer of Elaine Goode, accepted by the court as true, contains hearsay and hearsay within hearsay. Her testimony would not have been admissible if she had appeared in a timely manner and attempted to testify. Such error demonstrates the seriousness of the deprival of due process. The proffer offers more testimony of Carl Stewart on the issue of liability when, in fact, Mr. Stewart had already testified and given testimony damaging to respondents on cross examination. The proffer, made after conclusion of the trial, is an untimely attempt to bolster trial testimony without allowing further cross examination. For the court on trial *de novo* to rely upon such proffers and to allow its admission into evidence as evidence post trial has resulted in an entirely new trial in which petitioners were not allowed to participate. The proffer of Jim Brewer offers more testimony on the issue of liability although respondent Brewer had testified during the trial. This time, however, the proffer asserts hearsay and further summaries of his version of events without cross examination or the opportunity to object to hearsay. The proffers of the other individuals in the post trial proffer were, of course, untimely and offered on the issue of liability. No explanation was given for not offering this testimony in a timely manner during the liability portion of the trial. Some of the proffers are

based on hearsay, some express opinions upon the ultimate conclusion of good faith/bad faith; however, most are contrary to respondent Brewer's testimony as to whom he discussed problems with and what he was told. These defects demonstrate the extent of harm to petitioners' right to due process, such harm resulting in a complete denial of a right to procedural and substantive due process caused by the lack of opportunity to object, the lack of opportunity to cross examine and the lack of meaningful participation of counsel to challenge the evidence or offer counter testimony, or to impeach the testimony.

In finding the chancellor's findings of bad faith clearly erroneous, the effect of the court's reliance upon the untimely proffers of proof conclusively demonstrates the prejudice to petitioners. At the same time, the proffers of proof contradicted the evidence in the case which **supports** the chancellor's findings. For example, the chancellor found CEI was qualified to build the project. This finding is not challenged. Respondent McCoy testified the qualify of CEI's work was not being questioned. This testimony is directly contrary to the allegations of poor workmanship in the proffer of proof. Further, the allegations of poor workmanship in the proffer is contrary to the school architect's testimony, which architect testified for the respondents. He placed the blame for problems on his own specification and on trouble with sub-contractors. He did not state poor workmanship was one of the problems.

Most significant is the trial testimony of respondent Brewer:

> My concerns with regard to CEI were based on my knowledge and understanding of the problems they had with coordinating work of sub-contractors on the Mattison School project and some problems that seemed to be apparent with the Morrilton sewer project. I read **newspaper** articles and discussed through the years with **members** of the **school board** and **superintendent** of the school. (Ab. 312) (Emphasis added.)

This testimony is inconsistent with the matters set forth in the proffer. No mention at trial was made of discussion with city council members or a mayor as is set forth in the proffer. The plain truth of the matter is that the proffer is so full of hearsay and of information that cannot be substantiated, the testimony would not have been admissible in large part, and any remaining parts would have been incredible.

CONCLUSION

The Court should review this case because the issue of right to fair trial is a fundamental right of substantial public importance and concern. It is respectfully submitted that writ of certiorari should issue.

Respectfully submitted,

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Appendix

SUPREME COURT OF ARKANSAS
No. 89-34

Opinion Delivered December 11, 1989

Conway Corporation, et al.,
Appellants

vs.

Construction Engineers, Inc.,
Appellee

Appeal from Pulaski Chancery Court, First Div.
Lee Munson, Chancellor
(86-3687)

SUBSTITUTED OPINION.
REVERSED AND DISMISSED.

DARRELL HICKMAN, *Associate Justice:*

Construction Engineers, Inc. (CEI), the low bidder on a municipal construction contract, sued the appellants for wrongfully rejecting its bid and awarding the contract to the second lowest bidder, Limbaugh Construction Company. Appellants are the Conway Corporation, a nonprofit corporation which, under contract, operates the utilities owned by the City of Conway; the Corporation's directors; Jim Brewer, the general manager of the Corporation; and Bennie McCoy, the engineer on the construction project. The

chancellor found the appellants wrongfully rejected CEI's bid. Because that finding was clearly erroneous, we reverse and dismiss this case.

CEI filed suit in Pulaski County Chancery Court on August 20, 1986, seeking injunctive and declaratory relief and damages.[1] The complaint alleged the contract was awarded in violation of the law, and that the appellants had conspired to interfere with CEI's business expectancy. The appellants answered that they were immune from tort liability, and that they had exercised good faith discretion in carrying out their public duties.

After the lawsuit was filed, and without objection by the appellants, CEI requested a special master to hear evidence on the issue of temporary injunctive relief. In determining whether CEI had a probability of success on the merits, the master found there was a reasonable basis for the rejection of CEI's bid and that the appellants had acted in good faith.

Those findings were presented to the chancellor. He did not immediately accept or reject the findings, but held a hearing to receive additional evidence. He concluded that an injunction should not issue because construction on the project was already 43% complete, but he rejected the remainder of the

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[1] The suit was filed in Pulaski County because McCoy, the engineer, is a resident there.

master's findings. He determined that the Corporation's rejection of CEI's bid was arbitrary and without cause and that Brewer and McCoy acted in bad faith in urging rejection of the bid. The appellants were held jointly and severally liable for $194,295, the profit CEI would have made had it received the contract. Ratepayers, who had intervened with an illegal exaction suit, were awarded $66,100 difference in CEI's and Limbaugh's bids.

The appellants seek reversal on a myriad of issues, including immunity, lack of jurisdiction, due process, improper remarks by the chancellor, and insufficiency of the evidence. CEI cross-appeals, asking for attorney fees, pre-judgment interest and punitive damages. *Amicus curiae* briefs have been filed by the Arkansas Water Managers Association and by the Associated General Contractors of America. The case is resolved most readily by examining the evidence and the chancellor's findings.

In May of 1986, the Conway Corporation solicited bids on the expansion of Conway's water treatment plant. Jim Brewer asked Bennie McCoy to contact CEI and dissuade it from bidding on the project. The basis for Brewer's concern was CEI's performance in 1980-81 as general contractor on another local project, the construction of an elementary school for the Conway School District. According to Brewer's information (which was received from his close friend and school superintendent Carl Stuart, as well as from

local newspaper articles), there had been serious problems with the school's plumbing, cabinetwork, and windows as a result of faulty construction. When a dispute arose among CEI, the architect, the school district and the subcontractors as to who was responsible for the problems, a lawsuit was brought, resulting in lengthy delays. The school's problems were apparently well known throughout Conway and Brewer described the project as a "fiasco."

Following Brewer's instructions, McCoy called Steve and Danielle Smith, the husband and wife engineers who owned CEI, on May 19 and May 29 and wrote them on June 3 to express Brewer's reservations about their ability to perform the work. He told Steve Smith, "I understand you got a bit of a black eye in the Conway community over the Conway school you built." Smith admitted he had gotten "cross-ways" with the architect on that project. McCoy also asked about rumors that CEI was behind schedule on one of its current projects, the construction of a sewage plant in nearby Morrilton. Smith said he was behind because of late equipment deliveries but expected that his completion-schedule would be extended. CEI was not dissuaded from submitting a bid.

Bids were opened on June 26. CEI's bid was lowest and Limbaugh's the next lowest. Brewer immediately ordered McCoy to conduct a post-bid investigation of both CEI and Limbaugh (neither Brewer

or McCoy was familiar with Limbaugh). In the meantime, Brewer obtained legal advice on the propriety of awarding the contract to the second lowest bidder.

Between June 30 and July 3, McCoy spoke with various references who gave excellent reports on Limbaugh, but gave CEI, at best, mixed reviews. One reference reported that CEI did good, quality work, and CEI's surety gave a favorable report. But damaging references were given by the engineers on the Morrilton project who spoke of supervisory problems and a "paper war" which resulted when CEI missed a critical milestone, and by the architect on the Conway school who said the project was the worst he had ever experienced.

These matters were presented to the board of the Corporation at its next meeting. The board was concerned that the improvements be completed on time to avoid an anticipated water shortage. After hearing Brewer's information and recommendation, the members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI. They also noted that, while CEI had never completed a project of this magnitude, Limbaugh had constructed ten water and sewage treatment plants in the past five years.

The first question we must answer is, did the Corporation have the discretion to award to the contract

to anyone other than the lowest monetary bidder? The answer is yes.

CEI and the Associated General Contractors rely on Ark. Code Ann. §§19-11-403 and 404 (1987), arguing that the Corporation had no discretion to award the contract to anyone other than the lowest bonded bidder. Section 19-11-403 provides that bids submitted on public construction contracts must be accompanied by a surety bond. Section 19-11-404 provides as follows:

> All bidders being made responsible in the manner stated in §19-11-403, it shall be the duty of persons empowered to accept bids to accept no other bid than the lowest, except upon default of the lowest bidder.

The appellants urge the application of Ark. Code Ann. §22-9-203 (1987), which governs the award procedure on public improvement contracts, including municipal improvements costing over $10,000. Section 22-9-203(d) provides that the awarding authority shall:

> [O]pen and compare bids, and thereafter award the contract to the lowest responsible bidder, but only if it is the opinion of the authority that the best interests of the taxing unit would be served thereby.

We find the legislature did not intend §§19-

11-403 and 404 to apply to contracts like the one here. Numerous public contracts are specifically exempted from the requirements of those statutes under Ark. Code Ann. §19-11-402(b) (1987):

> The provisions of this subchapter shall not be applicable to:
>
> (1) Highway maintenance and construction contracts;
>
> (2) Any contracts let by the Office of State Purchasing.
>
> (3) Any contracts let by the counties of this state;
>
> (4) State agency contracts for commodities and services subject to other appropriate law;
>
> (5) Cities and towns having boards of public affairs operating public utilities, auditoriums, airports, or other city owned properties; or
>
> (6) Commissions appointed by cities operating public utilities, auditoriums, airports, or other city owned properties.

In light of these many exceptions, it is apparent the legislature intended this law to apply only

to a limited class of public contracts. In fact, a recent amendment exempts any contract let by a municipality. See Ark. Code Ann. §19-11-402(b)(3) (Supp. 1987).

The statute particularly exempts contracts let by municipal utility commissions. Although the Conway Corporation is not, strictly in name, a utility commission, that is what it is; it performs the same duties as a commission in managing and operating a municipal waterworks. *See* Ark. Code Ann. §14-234-306 (1987).

Finally, §22-9-203 applies to specific types of public contracts—major repairs or alterations, erection of buildings or other structures, or permanent improvements, costing over a certain dollar amount. Since this specific statute governs the subject, its application is favored over the more general provisions of §§19-11-401 to 405. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

We find the Corporation, under §22-9-203, had the discretion to reject CEI's bid so long as the rejection was for good cause and in good faith. *Worth James Constr. Co. v. Jacksonville Water Comm'n.*, 267 Ark. 214, 590 S.W.2d 256 (1979).

So, the next question we must answer is whether the chancellor's finding of bad faith is clearly erroneous. We find it is.

Chancery cases are tried *de novo* on appeal, but we will not reverse the chancellor's findings unless clearly erroneous, giving due deference to the chancellor's superior position in determining the credibility of the witnesses. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); ARCP Rule 52(a). In applying that standard of review in this case, it is important to remember that the master, not the chancellor, heard the testimony of appellant McCoy[2] and that the chancellor should accept the master's findings unless clearly erroneous. ARCP Rule 53(e)(2). Three factors were crucial to the chancellor's decision: (1) he called McCoy's investigation cursory and biased, and said that negative information had been deliberately solicited; he specifically questioned McCoy's truthfulness, saying his July 3 notes on CEI referred to incidents that did not happen until the following August; (2) between the time of the school project and this project, CEI had done satisfactory work on another job for the Corporation; and (3) there was evidence that Brewer had decided, even before the bids were opened, not to award the contract to CEI.

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[2]There was some confusion over the subject matter of the hearing held by the chancellor. The appellants understandably thought it concerned injunctive relief only and McCoy was actually excused from the hearing. The only testimony he gave was at the hearing before the master. All appellants asked the chancellor for another opportunity to present evidence concerning their liability. The chancellor refused but allowed additional testimony to be proffered through affidavits. It is not clear whether we may consider those proffered affidavits in our de novo review, but we will not do so here. Our decision is based on the evidence considered by the master and the chancellor.

Bad faith consists of dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge. *Stevenson v. Union Standard Ins. Co.*, 294 Ark. 651, 746 S.W.2d 39 (1988). The chancellor's determination that McCoy's investigation was biased and dishonest is not supported by the evidence. McCoy received both positive and negative comments on CEI and duly reported both. Nothing indicates he manufactured the negative comments or reported them in a manner that obscured the truth.

The allegation that McCoy's notes referred to an event that had not yet taken place is also unfounded. The notes show he spoke with an engineer on the Morrilton project on July 3 and was told that there were problems with a small structure erected by CEI. The chancellor was convinced by CEI's argument that problems with the structure did not occur until August 1, but Billy Joe Roper, a foreman on the project unequivocally testified he spoke with the engineer about problems with the structure *30 to 45 days before* August 1. If the engineer did mention the structure to McCoy (a fact which the engineer could not recall, but did not flatly deny), it could have happened on or before July 3. It is also important that the notes containing the information were written by McCoy for his own personal use in preparing for a deposition in this case.

The chancellor also referred to the fact that

CEI was allowed to bid on two Conway Corporation projects in 1984. One job involved the same water treatment plant, but did not require CEI to perform as a general contractor, only a subcontractor on a job costing less than $35,000. The other project was construction of an office building for the Corporation. CEI was an unsuccessful bidder on that project, and Brewer testified he was not aware CEI had submitted a bid. It is clear that neither of these projects involved CEI operating as a general contractor on a crucial municipal project on which time was of the essence.

Finally, the chancellor found that Brewer made his decision to reject CEI's bid before any investigation took place. There is a reasonable basis for that finding. The efforts to dissuade CEI from bidding took place a month and a half before bids were opened. Brewer even used Limbaugh's bid figure in his budget tabulation, compiled on the day of the bid opening. But there is no evidence that this action was taken with any motive other than the desire to avoid the same delays and problems that plagued the last local municipal project on which CEI performed as a general contractor.

The record is simply void of any evidence that the Corporation, Brewer or McCoy acted with improper motives or with hatred, ill will or a spirit of revenge. Because the chancellor's findings were clearly erroneous, and because he gave no reason for rejecting the master's findings as clearly erroneous, we find the

Corporation did not exercise its discretion in bad faith. Therefore, the award to the ratepayers and the award of lost profits against the Conway Corporation are reversed.

This does not resolve the issue of Brewer's and McCoy's liability because bad faith need not be proven to recover for tortious interference with a business expectancy. *Walt Bennett Ford, Inc. v. Pulaski County Spl. School Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981), *supp. opinion on denial of rehearing.* However, the defendant may show his interference was privileged. Privilege means a defendant will not be liable if he acts, without bad faith, to protect the public interest or a third person to whom he stands in a relation of responsibility. The evidence, as stated above, shows Brewer and McCoy should have the benefit of the privilege. They acted without bad faith in the interest of those to whom they were responsible and should not be held liable for interference with a business expectancy.[3] Therefore, the award of damages against them is reversed.

We do not reach the issue of whether the appellants are immune from liability as municipal agents or employees. *See* Ark. Code Ann. §21-9-301 (1987);

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[3]We do not address the question of whether CEI had a valid business expectancy, nor do we decide whether Brewer and McCoy, as agents of the Corporation, interfered with CEI's contract with a "third party." See Navorro-Monzo v. Hughes, 297 Ark. 444, 763 S.W.2d 635 (1989).

Matthews v. Martin, 280 Ark. 345, 658 S.W.2d 374 (1983).[4] Nor do we reach the question of whether the claim against appellant McCoy should have been transferred to circuit court. *See McCoy v. Munson*, 294 Ark. 488, 744 S.W.2d 708 (1988). Having reversed the award of damages, we do not address CEI's issues on cross-appeal.

One issue does merit discussion. This case was tried prior to our decision in *Klinger v. City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1988). In *Klinger* an unsuccessful bidder sued the city for lost profits. We said the following:

> We find the general rule to be that statutes requiring competitive bidding for government contracts are enacted for the benefit of the taxpayers rather than for the benefit of those who would sell goods and services to governmental entities. Although violation of a competitive bidding statute may create a right to an equitable remedy or mandamus, it does not give rise to a claim for damages. (Cites omitted.)

The appellants claim this language requires reversal of the award of damages against them.

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[4]Ark. Code Ann. §16-120-102 (Supp. 1987), which grants immunity to nonprofit corporations, was not in effect at the time this cause of action arose.

The appellee counters this argument by citing *Walt Bennett Ford, Inc. v. Pulaski Spl. School Dist., supra.* There, a disappointed bidder sued to set aside a contract between the school district and the successful bidder and also sued various individuals for the tort of interference with a contract. We held that "an unsuccessful bidder does have standing to sue for alleged wrongs" in the bidding process.

Prior to the *Walt Bennett Ford* case, our law was that a disappointed bidder had no standing to sue for a violation of competitive bidding statutes. In *Bank of Eastern Ark. v. Bank of Forrest City,* 94 Ark. 311, 126 S.W. 837 (1910), and *Arkansas Democrat Co. v. Press Printing Co.*, 57 Ark. 322, 21 S.W. 586 (1893), we held that injunctive relief was not available to the unsuccessful bidder because he had no standing. Those cases were expressly overruled in *Walt Bennett Ford.* We held that the appellant, who had not asked for an injunction or lost profit damages, had standing to seek avoidance of the contract. We recognized the tort action against the individuals as being a separate and distinct cause of action in which standing was not an issue.

The two cases are not irreconcilable. An unsuccessful bidder may challenge the legality of the authority's action by way of injunctive or declaratory relief or mandamus for example, but he may not recover lost profit damages from the authority. Even so, according to *Walt Bennett Ford,* he is not prevented from

pursuing a tort action and damages against individual defendants, such as Brewer and McCoy in this case. But that statement is without regard to the question of immunity, which was not an issue in *Walt Bennett Ford.*

Reversed and dismissed

PURTLE, J., not participating.

SUPREME COURT OF ARKANSAS
No. 89-34

Opinion Delivered October 30, 1989

Conway Corporation, et al.,
Appellants
vs.
Construction Engineers, Inc.,
Appellee

Appeal from Pulaski Chancery Court, First Div.
Lee Munson, Chancellor
(86-3687)

REVERSED AND DISMISSED.

DARRELL HICKMAN, *Justice:*

Construction Engineers, Inc. (CEI), the low bidder on a municipal construction contract, sued the appellants for wrongfully rejecting its bid and awarding the contract to the second lowest bidder, Limbaugh Construction Company. Appellants are the Conway Corporation, a nonprofit corporation which, under contract, operates the utilities owned by the City of Conway; the Corporation's directors; Jim Brewer, the general manager of the Corporation; and Bennie McCoy, the engineer on the construction project. The chancellor found the appellants wrongfully rejected

CEI's bid. Because that finding was clearly erroneous, we reverse and dismiss this case.

CEI filed suit in Pulaski County Chancery Court on August 20, 1986, seeking injunctive and declaratory relief and damages.[1] The complaint alleged the contract was awarded in violation of the law, and that the appellants had conspired to interfere with CEI's business expectancy. The appellants answered that they were immune from tort liability, and that they had exercised good faith discretion in carrying out their public duties.

After the lawsuit was filed, and without objection by the appellants, CEI requested a special master to hear evidence on the issue of temporary injunctive relief. In determining whether CEI had a probability of success on the merits, the master found there was a reasonable basis for the rejection of CEI's bid and that the appellants had acted in good faith.

Those findings were presented to the chancellor. He did not immediately accept or reject the findings, but held a hearing to receive additional evidence. He concluded that an injunction should not issue because construction on the project was already 43% complete, but he rejected the remainder of the

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[1]The suit was filed in Pulaski County because McCoy, the engineer, is a resident there.

master's findings. He determined that the Corporation's rejection of CEI's bid was arbitrary and without cause and that Brewer and McCoy acted in bad faith in urging rejection of the bid. The appellants were held jointly and severally liable for $194,295, the profit CEI would have made had it received the contract. Ratepayers, who had intervened with an illegal exaction suit, were awarded $66,100 difference in CEI's and Limbaugh's bids.

The appellants seek reversal on a myriad of issues, including immunity, lack of jurisdiction, due process, improper remarks by the chancellor, and insufficiency of the evidence. CEI cross-appeals, asking for attorney fees, pre-judgment interest and punitive damages. *Amicus curiae* briefs have been filed by the Arkansas Water Managers Association and by the Associated General Contractors of America. The case is resolved most readily by examining the evidence and the chancellor's findings.

In May of 1986, the Conway Corporation solicited bids on the expansion of Conway's water treatment plant. Jim Brewer asked Bennie McCoy to contact CEI and dissuade it from bidding on the project. The basis for Brewer's concern was CEI's performance in 1980-81 as general contractor on another local project, the construction of an elementary school for the Conway School District. According to Brewer's information (which was received from his close friend and school superintendent Carl Stuart, as well as from

local newspaper articles), there had been serious problems with the school's plumbing, cabinetwork, and windows as a result of faulty construction. When a dispute arose among CEI, the architect, the school district and the subcontractors as to who was responsible for the problems, a lawsuit was brought, resulting in lengthy delays. The school's problems were apparently well known throughout Conway and Brewer described the project as a "fiasco."

Following Brewer's instructions, McCoy called Steve and Danielle Smith, the husband and wife engineers who owned CEI, on May 19 and May 29 and wrote them on June 3 to express Brewer's reservations about their ability to perform the work. He told Steve Smith, "I understand you got a bit of a black eye in the Conway community over the Conway school you built." Smith admitted he had gotten "cross-ways" with the architect on that project. McCoy also asked about rumors that CEI was behind schedule on one of its current projects, the construction of a sewage plant in nearby Morrilton. Smith said he was behind because of late equipment deliveries but expected that his completion schedule would be extended. CEI was not dissuaded from submitting a bid.

Bids were opened on June 26. CEI's bid was lowest and Limbaugh's the next lowest. Brewer immediately ordered McCoy to conduct a post-bid investigation of both CEI and Limbaugh (neither Brewer

nor McCoy was familiar with Limbaugh). Between June 30 and July 3, McCoy spoke with various references who gave excellent reports on Limbaugh, but gave CEI, at best, mixed reviews. One reference reported that CEI did good, quality work, and CEI's surety gave a favorable report. But damaging references were given by the engineers on the Morrilton project who spoke of supervisory problems and a "paper war" which resulted when CEI missed a critical milestone, and by the architect on the Conway school who said the project was the worst he had ever experienced.

In the meantime, Brewer sought guidance from the mayor and several city council members who advised him it would be a mistake to award the contract to CEI in light of the problems with the school project.[2] He also obtained legal advice on the propriety of awarding the contract to the second lowest bidder.

These matters were presented to the board of the Corporation at its next meeting. The board was concerned that the improvements be completed on time to avoid an anticipated water shortage. After hearing Brewer's information and recommendation, the

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[2]Some of the evidence referred to was not presented at the hearing before the chancellor, but was proffered at a later time. There was some confusion over the subject matter of the hearing, and the appellants understandably thought it concerned injunctive relief only. In fact, the chancellor excused appellant McCoy from the hearing, saying the issue of his liability would not be reached. When the chancellor ruled against the appellants on the issue of liability for damages, they proffered additional evidence. Appellate review of equity cases is de novo and improperly excluded evidence may be considered. McCoy Farms, Inc. v. J&M McKee, 263 Ark. 20, 563 S.W.2d 409, cert. denied, 439 U.S. 862 (1978).

members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI. They also noted that, while CEI had never completed a project of this magnitude, Limbaugh had constructed ten water and sewage treatment plants in the past five years.

The first question we must answer is, did the Corporation have the discretion to award to the contract to anyone other than the lowest monetary bidder? The answer is yes.

CEI and the Associated General Contractors rely on Ark. Code Ann. §§19-11-403 and 404 (1987), arguing that the Corporation had no discretion to award the contract to anyone other than the lowest bonded bidder. Section 19-11-403 provides that bids submitted on public construction contracts must be accompanied by a surety bond. Section 19-11-404 provides as follows:

> All bidders being made responsible in the manner stated in §19-11-403, it shall be the duty of persons empowered to accept bids to accept no other bid than the lowest, except upon default of the lowest bidder.

The appellants urge the application of Ark. Code Ann. §22-9-203 (1987), which governs the award procedure on public improvement contracts, including municipal improvements costing over $10,000. Section

22-9-203(d) provides that the awarding authority shall:

> [O]pen and compare bids, and thereafter award the contract to the lowest responsible bidder, but only if it is the opinion of the authority that the best interests of the taxing unit would be served thereby.

We find the legislature did not intend §§19-11-403 and 404 to apply to contracts like the one here. Numerous public contracts are specifically exempted from the requirements of those statutes under Ark. Code Ann. §19-11-402(b) (1987):

> The provisions of this subchapter shall not be applicable to:
>
> (1) Highway maintenance and construction contracts;
>
> (2) Any contracts let by the Office of State Purchasing.
>
> (3) Any contracts let by the counties of this state;
>
> (4) State agency contracts for commodities and services subject to other appropriate law;
>
> (5) Cities and towns having boards of public

affairs operating public utilities, auditoriums, airports, or other city owned properties; or

(6) Commissions appointed by cities operating public utilities, auditoriums, airports, or other city owned properties.

In light of these many exceptions, it is apparent the legislature intended this law to apply only to a limited class of public contracts. In fact, a recent amendment exempts any contract let by a municipality. See Ark. Code Ann. §19-11-402(b)(3) (Supp. 1987).

The statute particularly exempts contracts let by municipal utility commissions. Although the Conway Corporation is not, strictly in name, a utility commission, that is what it is; it performs the same duties as a commission in managing and operating a municipal waterworks. *See* Ark. Code Ann. §14-234-306 (1987).

Finally, §22-9-203 applies to specific types of public contracts—major repairs or alterations, erection of buildings or other structures, or permanent improvements, costing over a certain dollar amount. Since this specific statute governs the subject, its application is favored over the more general provisions of §§19-11-401 to 405. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

We find the Corporation, under §22-9-203,

had the discretion to reject CEI's bid so long as the rejection was for good cause and in good faith. *Worth James Constr. Co. v. Jacksonville Water Comm'n.*, 267 Ark. 214, 590 S.W.2d 256 (1979).

So, the next question we must answer is whether the chancellor's finding of bad faith is clearly erroneous. We find it is.

Chancery cases are tried *de novo* on appeal, but we will not reverse the chancellor's findings unless clearly erroneous, giving due deference to the chancellor's superior position in determining the credibility of the witnesses. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); ARCP Rule 52(a). In applying that standard of review in this case, it is important to remember that some of the evidence we are considering is in the form of proffered affidavits; that the master, not the chancellor, heard the testimony of appellant McCoy and that the chancellor should accept the master's findings unless clearly erroneous. ARCP Rule 53(e)(2). Three factors were crucial to the chancellor's decision: (1) he called McCoy's investigation cursory and biased, and said that negative information had been deliberately solicited; he specifically questioned McCoy's truthfulness, saying his July 3 notes on CEI referred to incidents that did not happen until the following August; (2) between the time of the school project and this project, CEI had done satisfactory work on another job for the Corporation; and (3) there was evidence that

Brewer had decided, even before the bids were opened, not to award the contract to CEI.

Bad faith consists of dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge. *Stevenson v. Union Standard Ins. Co.*, 294 Ark. 651, 746 S.W.2d 39 (1988). The chancellor's determination that McCoy's investigation was biased and dishonest is not supported by the evidence. McCoy received both positive and negative comments on CEI and duly reported both. Nothing indicates he manufactured the negative comments or reported them in a manner that obscured the truth.

The allegation that McCoy's notes referred to an event that had not yet taken place is also unfounded. The notes show he spoke with an engineer on the Morrilton project on July 3 and was told that there were problems with a small structure erected by CEI. The chancellor was convinced by CEI's argument that problems with the structure did not occur until August 1, but Billy Joe Roper, a foreman on the project unequivocally testified he spoke with the engineer about problems with the structure *30 to 45 days before* August 1. If the engineer did mention the structure to McCoy (a fact which the engineer could not recall, but did not flatly deny), it could have happened on or before July 3. It is also important that the notes containing the information were written by McCoy for his own personal

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The chancellor also referred to the fact that CEI was allowed to bid on two Conway Corporation projects in 1984. One job involved the same water treatment plant, but did not require CEI to perform as a general contractor, only a subcontractor on a job costing less than $35,000. The other project was construction of an office building for the Corporation. CEI was an unsuccessful bidder on that project, and Brewer testified he was not aware CEI had submitted a bid. It is clear that neither of these projects involved CEI operating as a general contractor on a crucial municipal project on which time was of the essence.

Finally, the chancellor found that Brewer made his decision to reject CEI's bid before any investigation took place. There is a reasonable basis for that finding. The efforts to dissuade CEI from bidding took place a month and a half before bids were opened. Brewer even used Limbaugh's bid figure in his budget tabulation, compiled on the day of the bid opening. But there is no evidence that this action was taken with any motive other than the desire to avoid the same delays and problems that plagued the last local municipal project on which CEI performed as a general contractor.

The record is simply void of any evidence that the Corporation, Brewer or McCoy acted with improper motives or with hatred, ill will or a spirit of

revenge. Because the chancellor's findings were clearly erroneous, and because he gave no reason for rejecting the master's findings as clearly erroneous, we find the Corporation did not exercise its discretion in bad faith. Therefore, the award to the ratepayers and the award of lost profits against the Conway Corporation are reversed.

This does not resolve the issue of Brewer's and McCoy's liability because bad faith need not be proven to recover for tortious interference with a business expectancy. *Walt Bennett Ford, Inc. v. Pulaski County Spl. School Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981), *supp. opinion on denial of rehearing.* However, the defendant may show his interference was privileged. Privilege means a defendant will not be liable if he acts, without bad faith, to protect the public interest or a third person to whom he stands in a relation of responsibility. The evidence, as stated above, shows Brewer and McCoy should have the benefit of the privilege. They acted without bad faith in the interest of those to whom they were responsible and should not be held liable for interference with a business expectancy.[3] Therefore, the award of damages against them is reversed.

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Reversed and dismissed

PURTLE, J., not participating.

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

CONSTRUCTION ENGINEERS, INC.
PLAINTIFF

VS. NO. 86-3687

THE CONWAY CORPORATION, et al.
DEFENDANTS

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR

MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS

CHANCELLOR'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

On March 24, 1987, the Plaintiff's Petition for a temporary restraining order and preliminary injunction came on for hearing before a Special Master appointed by this Court. At the conclusion of that hearing, the Master reported his Findings of Fact and Conclusions of Law, which Findings and Conclusions were subsequently objected to by the Plaintiff,

Construction Engineers, Inc. and the Intervenor, Associated General Contractors of America, Arkansas Chapter, by motions and notices duly filed and served. At a later hearing on those objections, this Court held that pursuant to Rule 53(e)(2) it would receive further evidence on the plaintiff's claims and would consolidate and advance those claims with the Plaintiff's claim for permanent injunctive relief. Such action was taken and a trial on the Plaintiff's claim for a permanent injunction was held on June 25-26 and June 29, 1987. After hearing the testimony and other evidence presented at that trial, after having reviewed the transcript and exhibits from the prior hearing before the Master, and being well and sufficiently advised as to all matters of law and fact, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Plaintiff, Construction Engineers, Inc., (hereinafter CEI) is an Arkansas corporation duly existing and authorized to do business under the laws of the State of Arkansas, with its principal place of business located in Russellville, Pope County, Arkansas. CEI holds a contractors license which was duly authorized by the Arkansas Contractors' Licensing Board.

2. The Defendant, The Conway Corporation, is a private, non-profit corporation which operates the water system of the City of Conway, Arkansas, by virtue of and in accordance with a contract with said City.

3. The Defendant, M. D. Limbaugh Construction Co., is a Missouri corporation authorized to do business in Arkansas, and having its registered agent located in Pulaski County, Arkansas.

4. The Defendant, Jim Brewer, is an individual resident of Conway, Faulkner County, Arkansas, and was and is the General Manager of The Conway Corporation.

5. The Defendant, Bennie J. McCoy, is an individual resident of Pulaski County, Arkansas, and is an engineer for and President of Crist Engineers of Pulaski County, Arkansas. At all times pertinent to this litigation, Defendant McCoy was employed under contract by The Conway Corporation.

6. The Defendants, Larry Graddy, Frank Robins, III, Lou Gordy, Bill Pate, Bob Clifton, and Leo Crofton, III, individual residents of Conway, Faulkner County, Arkansas, are members of the Board of Directors of The Conway Corporation.

7. The Intervenor, Associated General Contractors of America, Arkansas Chapter (hereinafter AGC), is a non-profit professional association which represents the interests of contractors throughout the State of Arkansas, and which has its principal office located in Little Rock, Pulaski County, Arkansas.

8. The Intervenors, Michael Sutterfield and Catherine N. Rushing, are individual residents, ratepayers and taxpayers of the City of Conway, Faulkner County, Arkansas.

9. In May and June, 1986, Defendant, The Conway Corporation, solicited bids from contractors through the public bidding procedures for the construction of certain water treatment improvements to the water system of the City of Conway, Arkansas. The bids were to be submitted to Defendant The Conway Corporation until 1:30 P. M., June 26, 1986, at which time the bids were opened and announced publicly. The bidding was to be conducted pursuant to the laws of the State of Arkansas regulating construction of public improvements, as well as pursuant to the bid specifications themselves contained in the documents.

10. The Plaintiff, CEI, among others, submitted its bid to The Conway Corporation for a contract to construct improvements shown on Schedule 1 of the bid documents. CEI's bid on said project, which was accompanied by all required bonds, was $3,885,900.00, and Defendant M. D. Limbaugh Construction Co.'s bid was $3,952,000.00.

11. CEI was the low bidder on the public works project in question, and M. D. Limbaugh was the second low bidder on the project.

12. Upon the recommendation of Defendants Jim Brewer and Bennie McCoy, The Conway Corporation, through its Board of Directors, voted on July 7, 1986, not to award the contract to CEI, the low bidder, but to instead award the contract to Defendant M. D. Limbaugh Construction Co., the second low bidder.

13. On August 20, 1986, CEI filed suit requesting a preliminary and permanent injunction enjoining Defendants, The Conway Corporation, its named board members and Jim Brewer from awarding the contract to Defendant M. D. Limbaugh, or if the contract had already been awarded, from failing to set aside said contract. CEI further requested that M. D. Limbaugh be enjoined from performing work under the contract, and that CEI be awarded the contract. Alternatively, CEI prayed for damages against each of the named Defendants (except Limbaugh) individually, and in their capacities as agents for The Conway Corporation.

14. In its Complaint, CEI alleged, among other things, that the named Defendants acted in bad faith and without good cause in awarding the contract to Defendant Limbaugh and that their actions were arbitrary and capricious and in violation of the Arkansas bidding statutes.

15. Subsequent to the filing of the Complaint,

the AGC, as well as Michael Sutterfield and Catherine N. Rushing, requested that they be allowed to intervene in this action and after motions and orders allowing the intervention were duly filed and serve, the Intervenors filed Complaints in Intervention which were also duly filed and served on the Defendants herein.

16. The Complaint in Intervention filed by AGC contends that M. D. Limbaugh was awarded the contract in question in violation of the Arkansas Public Bidding Statutes and that the named Defendants should be enjoined from proceeding with the contract.

17. The Complaint in Intervention filed by Michael Sutterfield and Catherine N. Rushing seeks relief in the form of injunctive relief as well as damages due to the Defendants actions which constitute an illegal exaction in violation of the Constitution and statutory laws of the State of Arkansas.

18. The Court finds that the AGC, Michael Sutterfield and Catherine N. Rushing, were rightfully allowed to intervene in this action and that their interests in this cause of action are substantial.

19. The Court further finds that the Plaintiff, CEI has proven that it was not only the low monetary bidder on the project in question, but that it was a responsible bidder, qualified and capable of performing the work for which it bid. Accordingly, CEI was the

"lowest responsible bidder" on the project as that term is set forth in the Arkansas bidding statutes found in Title 14 of the Arkansas Statutes Annotated. All credible evidence in this case so convinces the Court on this issue.

20. Plaintiffs and Intervenors contend that this case is controlled by *Ark. Stat. Ann.* §§14-113 through 14-116 (as amended by Act 862 of 1983), or in the alternative, by construing §§14-113 through 14-116 and §14-612 together so that the definition of responsible bidder contained in §14-114 applies to §14-612 and thus the law requires a public works contract to be given to that bidder who has posted all statutorily required bonds and is the lowest bidder in monetary terms. On the other hand, the Defendants contend that §14-612 alone is the controlling statute and allows discretion in the awarding of a public works contract. Under the Defendants' interpretation, "good faith" and "good cause" must be found to exist in order to deny the lowest monetary bidder the contract. While both parties' arguments seem well-taken, the Court finds that no matter which statute or statutes apply, the Defendants in this case should not have denied CEI the contract in question and that the decision to do so was arbitrary, capricious and without cause. The Court further finds that Defendants Jim Brewer and Bennie J. McCoy acted in bad faith in urging the denial of CEI's bid.

21. The Court specifically finds that Defendant Jim Brewer and Defendant Bennie J. McCoy

wrongfully and in bad faith made their decision to urge rejection of CEI's bid prior to the bids ever being accepted or opened and said Defendants deliberately set out to deny CEI the opportunity to bid on the project. The Court notes that the evidence shows that said Defendants wrongfully and without valid cause tried to dissuade CEI from even bidding on the project and this action was taken in light of a prior good working relationship between CEI and The Conway Corporation and Defendant Bennie J. McCoy.

22. Subsequent to Defendants Brewer and McCoy's decision to urge rejection of the CEI bid, and after it was discovered that CEI was in fact the low bidder on the project in question, Defendants Brewer and McCoy attempted to justify their decision to urge rejection of CEI's bid by conducting a most cursory and biased investigation which included such actions as soliciting negative letters and negative information regarding CEI, and passing on unsubstantiated rumors. Additionally, some of the notes and testimony of Bennie J. McCoy were proven to be untrue, and the investigation appears to have been a mere cover-up of his earlier decision to recommend that CEI's bid be rejected in favor of M. D. Limbaugh's bid. Specifically, McCoy's notes of his alleged investigation reflect that information from events which occurred after the investigation were used in an attempt to substantiate the results.

23. While the court finds that Defendants Brewer and McCoy acted in bad faith, it finds that the Board, while relying on erroneous information in voting to reject CEI's bid, did not act in bad faith. However, the Board's decision was without cause. Further, the Court has some concern with some of the board members' testimony which was inconsistent with the testimony of the Defendants own witness, Carl Stuart, who, contrary to the testimony of the board members, testified that he had only talked to Defendant Brewer regarding certain problems in connection with a Conway school constructed by CEI. And, as Stuart testified, this information was relayed to Defendant Brewer only after Mr. Brewer solicited same.

24. The Court further finds that under *Ark. Stat. Ann.* §§14-113 through 14-116 separately, or construed together with §14-612, or under §14-612 alone, this Court would and should enjoin the failure to award a contract to the lowest responsible bidder and would also enjoin construction by the second low bidder, as the Court cannot countenance bad faith or a failure to follow Arkansas law. However, this Court is also persuaded and finds that due to no fault on the part of the parties hereto or their attorneys, and specifically because the project in question is now some 43% complete, the disruption to the project, as well as the confusion and hardship which would result from the enjoining of the project would cause too great a harm to the citizens and ratepayers of the City of Conway. For

this reason, and this reason alone, the Court finds that an injunction should not issue against the Defendants in this case even though an injunction would normally be an appropriate remedy in this type of case. However, the Court does find that damages should be awarded to both CEI and Intervenors Michael Sutterfield and Catherine N. Rushing, as ratepayers and taxpayers, and accordingly will set a hearing on the issue of the Plaintiff and Intervenors' damage claims at a time to be set by this Court.

25. The Court also finds that the Masters Findings and Conclusions should be rejected and therefore the Defendants' Motion to adopt same should be denied.

26. Finally, the Court finds that Defendant Bennie J. McCoy's Separate Motion to Transfer to Circuit Court should be denied. Defendant McCoy contends that this Court is without jurisdiction because the claims against him are only for monetary damages. For two reasons this argument is without merit. First, where a chancery court has some nexus to the claim in question, whether the claim should be heard by that court is a matter of propriety rather than subject matter jurisdiction. Using this propriety, or discretion, and specifically confirming that all parties are properly before this Court, it is necessary to keep all parties and causes of action before this Court because all matters considered in this case arise out of the same transactions

and occurrences. By retaining all facets of this case, multiplicity of actions and repetitive presentation of the same evidence will be avoided. Second, where damages sought are incidental to a clearly equitable remedy, such as in this case, a chancery court can determine the damages issue under the "clean up" doctrine. Moreover, the Court specifically rejects Defendant McCoy's authority that a chancery court may not take jurisdiction of a tort claim arising out of the same transaction or occurrence as an equitable claim. *Gorchik v. Gorchik* was expressly overruled on that point by *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). Since the damages sought against Defendant McCoy and the other named Defendants are incidental to the Plaintiff's request for injunctive and declaratory relief, this Court has jurisdiction over the Plaintiff's and Intervenors' damage claims against the Defendants hereto.

LEE A. MUNSON
Chancellor
July 6, 1987.

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

CONSTRUCTION ENGINEERS, INC.
PLAINTIFF

VS. NO. 86-3687

THE CONWAY CORPORATION, et al.
DEFENDANTS

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR

MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS

JUDGMENT

The trial of this case was bifurcated on the Court's motion. The issue of liability was tried to the Court on June 25, June 26, and June 29, 1987. The evidence from earlier proceedings before a Master, which began on March 24, 1987, was consolidated with these hearings. On the 6th day of July, 1987, this Court issued its findings of fact and conclusions of law. The issue of damages was tried beginning the 8th day of

March, 1988. The case is now fully tried. The Court readopts its findings of fact and conclusions of law of July 6, 1987. The Court finds on the issue of damages as follows hereinbelow:

1.

Construction Engineers, Inc. (hereinafter referred to as "CEI") was the low bidder on the Gleason Project by an amount of $66,000.00. That amount shall be repaid to the taxpayers/ratepayers, as a class, through a refund to be included on each taxpayers'/ratepayers' monthly water bill. This refund shall be payable to those taxpayers/ratepayers who were users as of the date of the entry into this contract. This Court finds that date to be July 29, 1986. I further find that the attorney for the taxpayers/ratepayers, is entitled to attorney's fees in the amount of $6,600.00.

2.

The Court finds that the measure of damages to be awarded to the Plaintiff, CEI, is five percent (5%) of the total contract price. The Plaintiff's contract price was $3,885,900.00. I find that five percent (5%) of that amount is $194,295.00, which I find to be the correct measure of lost profits based on the totality of the testimony offered at the hearing on March 8 and March 9, 1988. I find that this award of damages is joint and several against the Conway Corporation, Jim Brewer and Bennie J. McCoy. While this Court had indicated in its May 3, 1988 letter that Defendant McCoy's agency status

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.,
Plaintiff

vs. No. 86-3687

The Conway Corporation, et al.
Defendants

Associated General Contractors
of America, Arkansas Chapter
Intervenor

Michael Sutterfield and
Catherine N. Rushing
Intervenors

AFFIDAVIT OF JAMES H. BREWER

KNOW ALL MEN BY THESE PRESENTS:

That I, James H. Brewer, having been first duly sworn, state on oath as follows:

1. In order to properly summarize and evaluate the events that culminated in the decision of the Conway Corporation Board not to award the Gleason water plant project to Construction Engineers, Inc. in July of 1986, one must go back in time to the 1980-83 time frame when the Conway Public School District

encountered Construction Engineers, Inc. ("CEI") as low bidder on the Florence Mattison Elementary School Project in Conway. A contract was awarded to CEI by the School District in August of 1980. The project was to be completed in June of 1981. Completion of this project in a timely manner was of the utmost importance because 300 students would have no school to attend in August of 1981 without this facility.

2. The Florence Mattison Project was incomplete and unacceptable in August of 1981. However, the contractor required a Certificate of Substantial Completion from the school district before it would allow children to occupy the facility. After CEI promised to properly address problems with regard to the water piping not being properly installed and insulated, the ceiling tiles not being properly installed, the building insulation not properly installed, the cabinets not being to specification, the windows being improperly hung and constructed of the wrong materials (i.e., plate glass windows were installed rather than safety glass in violation of state law concerning schools) and other problems, the school board signed the Certificate.

3. Notwithstanding the Certificate of Substantial Completion, the students had to move out of the building within a few months of occupancy because the improperly installed and uninsulated water piping ruptured from freezing. Since the piping was located in

may have protected him from a finding of damages, this Court is now persuaded the law of agency is otherwise. Accordingly, McCoy is found to be jointly and severally liable with Defendant, the Conway Corporation and Jim Brewer. The Court considered apportioning damages among the Defendants; however, without a request by Defendants for apportionment, the Court declines to do so.

At the trial on March 8 and March 9, 1988, Defendant McCoy proffered certain documents on the issue of liability. While this evidence on the issue of McCoy's liability was not timely presented, the Court has looked at McCoy's evidence in the interest of fairness to all parties. The proffer consists largely of a transcript of Defendant McCoy's testimony in the case and one version of a letter of July 3, 1986, which is Plaintiff's Exhibit 10, in the case. Both McCoy's testimony and the letter, Plaintiff's Exhibit 10, are already before the Court and were considered by the Court in arriving at its decision on the issue of liability. The only other evidence proffered by Defendant McCoy was the affidavits of an engineer and an attorney. While the Court has doubts as to the relevancy and competency of this proffered testimony, it should be noted that the proffered testimony does nothing to persuade the Court that its findings of July 6 on liability are incorrect. Consequently, even if the proffered testimony had been timely presented, the Court's findings would have been the same.

3.

The Court is unable to find that prejudgment interest is awardable in this action. Specifically, the Court finds that such an award would be speculative and was not determinable at the time the contract was entered into. Accordingly, prejudgment interest is denied.

4.

The Court does not find that an award of attorney's fees is proper or authorized by the law in this case. The Court hasreviewed the law cited by Plaintiff in its briefs, but is not convinced that the *Liles* case is controlling under this set of facts. Accordingly, the prayer of attorney's fees of Plaintiff is denied.

5.

The Court finds that it is without the power to award punitive damages. For that reason, this Court did not allow Plaintff to introduce proof on this issue or to argue evidence in the record which might touch on the issue of punitive damages at the trial on March 8 and March 9, 1988. Accordingly, Plaintiff's prayer for punitive damages is denied.

This Court reserves jurisdiction of this cause

to enforce its judgment and decree.

IT IS SO ORDER, ADJUDGED and DECREED.

LEE A. MUNSON
Chancellor
July 22, 1988

FRIDAY, ELDREDGE & CLARK
Attorneys at Law
2000 First Commercial Building
Little Rock, Arkansas 72201
March 23, 1988

Chancery Clerk
Pulaski County Courthouse
Little Rock, Arkansas 72201

Re: CEI v. The Conway Corporation, et al.
(Pulaski Chancery No. 86-3687

Gentlemen:

Enclosed please find the original and copies of a Proffer which I would appreciate your filing in the captioned case. Please stamp the extra copies with your filing stamp and return them to me in the enclosed envelope.

By copy of this letter I am serving a copy of the enclosed pleading upon all attorneys of record.

Thank you.

Sincerely yours,
MICHAEL G. THOMPSON

cc: Mr. David Orsini
Mr. James Moody
Mr. Jim Rhodes
Ms. Janice W. Vaughn

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

CONSTRUCTION ENGINEERS, INC.
PLAINTIFF

VS. NO. 86-3687

THE CONWAY CORPORATION, et al.
DEFENDANTS

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR

MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS

PROFFER

The defendants, (except Bennie McCoy) for their proffer herein, state:

1. This Court has previously decided the liability issues involved in this case and, by Order entered herein on February 25, 1988, has ruled that the defendants shall not be entitled to introduce any

evidence on the issue of liability, the question of bad faith or the character and reputation for truth and veracity of any of the parties.

2. These defendants intended to present evidence at the final hearing herein on March 8 and 9, 1988, touching on the matters mentioned above and were prepared to call witnesses who would testify with regard thereto. In view of the fact that the Court has denied the defendants the right to place such evidence into the record, the Court has, upon motion of the defendants, allowed them to proceed by way of proffer in the form of affidavits and otherwise.

3. The affidavits of Elaine Goode, James H. Brewer, Stanley Russ, Don Owen, Maurice Moix, Woodrow Cummins, William L. Wright, Jerry L. Maulden and David Harrington are attached hereto and made a part hereof and are hereby proffered by these defendants as evidence in their defense. If the affiants were present in Court and if the Court had allowed their testimony, they would have testified to the matters set forth in their respective affidavits.

4. The defendants further hereby proffer additional testimony from Carl Stuart (incorrectly identified in the record as "Stewart"), a previous witness. In the hearing held herein on June 29, 1987, Mr. Stuart stated, when asked if he had communicated his experience with the plaintiff on the Florence Mattison

School Project to the members of the Board of Directors of the Conway Corporation, that he did not know any of the board members except Frank Robins. He subsequently testified that while he personally knew the members of the board he did not know that they were board members. Mr. Stuart misunderstood the question asked of him and, if allowed to further testify, he would state that he did have conversations from time to time with the board members, not at a formal board meeting, during which he told them of his construction problems with the plaintiff.

5. In addition to the foregoing, these defendants hereby proffer all of the previous testimony taken in the case and ask the Court to consider such testimony along with the evidence contained herein in making a final decision on the liability issues involved in this case.

DATED this 23rd day of March, 1988.

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011)
Attorneys for Defendants
(Except Bennie McCoy)
By: MICHAEL G. THOMPSON

CERTIFICATE OF SERVICE

I, Michael G. Thompson, certify that a copy of the foregoing Proffer has been mailed to the following attorneys of record: Mr. David Orsini, Orsini & Associates, Centre Place, Suite 200, 212 Center Street, Little Rock, Arkansas 72201, Mr. James Moody, Wright, Lindsey & Jennings, 2200 Worthen Bank Building, Little Rock, Arkansas 722001, Mr. James Rhodes, 3800 Capitol Tower, Little Rock, Arkansas 72201, and Ms. Janice W. Vaughn, 3800 Capitol Tower, Little Rock, Arkansas 72201, on this 23rd day of March, 1988.

MICHAEL G. THOMPSON

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.
Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton, III, as Members of the Board of Directors of The Conway Corporation
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Elaine Goode, a resident of Conway, Arkansas, after having been first duly sworn, state on oath as follows:

1. I am a member of the Board of the Conway School District of Conway, Arkansas, and have been for a number of years. I was a member of the School Board when the Florence Mattison School Project was constructed in our city by Construction

Engineers, Inc.

2. As a member of the School Board, I became aware of numerous problems which we had with the performance of the construction contract by Construction Engineers, Inc. (CEI). In the first place, the construction plans called for the sewer lines serving the Project to be buried at a specified depth in order to allow the sewage to drain by gravity. CEI placed the lines too deep and, because of their mistake, wanted to use a lift pump to raise the sewage. This was objectionable and the Superintendent instructed CEI to properly relay the sewer line.

3. During the period in which the Florence Mattison School was under construction, the weather was good but the work was not accomplished on schedule. CEI continually lagged behind in getting the work finalized. The plans called for all water lines to be laid in the concrete floors. The contractor failed to place the water lines before pouring the concrete. Rather than tearing up the floors and repouring the concrete over the lines as required by the plans, CEI obtained permission from the architect to place the water lines above the ceiling of the building. The architect required the lines to be insulated but CEI failed to properly wrap the lines. As a consequence the water pipes froze, causing serious damage to the school building and its contents.

4. In addition to the foregoing, CEI failed to

place safety glass in all of the windows of the Project which was contrary to state laws which require such glass. All of the glass had to be replaced with the proper type of safety glass. None of the drawers in the Project were constructed according to plans and specifications. This caused numerous delays and problems.

5. I was quite concerned about CEI's competency in view of the fact that the building plans used by it were identical to the plans used on another school project with which I am familiar, the Julia Lee Moore School, which was built by Nabholz Construction Company. As compared with CEI's performance on the Florence Mattison School Project, we had absolutely no problem with Nabholz's performance on the Julia Lee Moore School, utilizing the same drawings and plans.

6. The School Board had to stand over CEI day after day to force it to get the job done. Without reservation, I would say that CEI's work product on the Florence Mattison School Project was the most shoddy, poorly constructed and poorly managed job I have ever seen. Since the job was completed, our regular maintenance people have been kept busy in correcting defects and attending to problems which should never have arisen if the contractor had done its job. I would never use CEI on another construction project.

7. I have known James H. Brewer, General Manager of The Conway Corporation, for many years. I,

of my own personal knowledge, know Mr. Brewer's reputation for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings or otherwise. Because of my knowledge of Mr. Brewer's high character I would unquestionably take his word at face value.

DATED this 9 day of March, 1988.

ELAINE GOODE

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

the ceiling (close to the roof) rather than in the floor as specified, the building was substantially damaged by flooding and classes were interrupted. Work continued on this project until January of 1983, significantly beyond the contract completion date of June 1981. The Florence Mattison School still requires excessive maintenance because of the original faulty construction.

4. The inability of CEI to properly perform under its contract and its lack of the managerial skill needed to coordinate the subcontracts of a project of this magnitude were widely known in the community and discussed quite frequently by members of the school board and the general citizenry of Conway. The litigation that followed seemed to be CEI's solution to their inability to get the school properly constructed within the allowed time frames, but spoke very little to the needs of the community for the housing of school children. This litigation was still pending as late as 1986.

5. In June of 1984, the Conway Corporation offered for bid a modification to the Gleason water plant (referred to by some as the "little Gleason" job) which included the installation of pumping and some concrete work. CEI submitted the low bid of $34,500.00 and was awarded the contract for this work. Even though we could recall very vividly the horrendous problems with CEI and its poor performance in the construction of the Florence Mattison school, it was more in the posture of a subcontractor on this project, since the Conway

Corporation was functioning as its own general contractor. The Conway Corporation had more employees at the construction site than did CEI. While CEI had only two or three employees on site, the Conway Corporation provided all supervision for and coordination of the entire project. With this arrangement, we were in total control of completion time of the project, which was critical. In this scenario and under these conditions, CEI performed adequately.

6. In 1985 and early 1986, the Conway Corporation planned a significant expansion of the Gleason water treatment plant, i.e., from a capacity of 7.5 million gallons per day to 15 million gallons per day. CEI requested and received a set of plans and specifications for the purpose of bidding this project.

7. In April and May of 1986, CEI was in the latter stages of a sewer construction project at Morrilton, Arkansas, and we were receiving reports that this project was experiencing difficulties with CEI of the same nature that were experienced in the Florence Mattison School project. In view of this information, a couple of Conway aldermen who had knowledge of that project, suggested to me that I should further check into the matter.

8. While I am an employee of the Conway Corporation, which operates the utilities owned by the City of Conway, I communicate very closely with the Conway City Council and stay attuned to its desires since

it does, in fact, represent the owner of the utilities operated by the Conway Corporation and since it is, in fact, the governing body in many substantial matters concerning the utility system. The City Council, as well as the Board of Directors and the management of the Conway Corporation were very sensitive to the water needs of the citizens of Conway, because we had experienced a shortfall in finished water available to the consumer in the summer of 1985. It was anticipated that, if the expansion of the plant was not completed by the summer of 1988, there would be a significant water shortage in Conway, which would substantially affect all of its citizens, including the University of Central Arkansas, the Human Services Development Center, Hendrix College and some 60 industries providing employment to over 6,000 people. Therefore, I felt that an investigation of this matter was of the utmost importance to our community.

9. Since I had planned to leave for an extended trip late in May and would not return until late June and since my work load during the month of May would not allow me time to make an investigation, I asked Mr. Bennie McCoy, President of Crist Engineers, and Roger Mills, Manager of Engineering & Planning for the Conway Corporation, to look into this matter. Discussions with McCoy and Mills led me to feel an obligation to contact Steve and Danielle Smith of CEI to alert them to our apprehensions concerning their ability to construct this project in a timely manner, considering

our knowledge of the Mattison School project and the Morrilton Sewer Plant project, since bidding on the Gleason water plant would require a great deal of their time and effort and would be rather expensive for them. Before leaving my office in late May, I asked Mr. McCoy to contact the Smiths and express to them our apprehensions. Mr. McCoy contacted the Smiths by telephone on two occasions and exchanged letters with them in late May and June.

10. The Conway Corporation accepted bids on the Gleason Water Plant project on June 26, 1986. CEI was the low bidder. In view of our apprehensions concerning CEI and because we had virtually no knowledge concerning the second low bidder, the M. D. Limbaugh Company of Sikeston, Missouri, I asked Mr. McCoy to prepare a study of the qualifications of both the low and second low bidders. After his study was complete, Mr. McCoy prepared a report which was presented to the Conway Corporation Board of Directors on July 7, 1986. I also prepared a report for the Board of Directors, which was presented to them at that same meeting, and which dealt, for the most part, with the financing of the project.

11. As manager of the Conway Corporation, I fulfilled my obligation to my Board by rendering a prepared recommendation that included awarding the Gleason Water Plant project bid to the M. D. Limbaugh Construction Company as the second low bidder and

first low responsible bidder, as required by state law. My recommendation was based upon the report of Mr. McCoy, the discussions and information acquired from Roger Mills, Manager of Engineering & Planning of the Conway Corporation, Dale Norman, Superintendent of Water & Sewer Systems & Plants of the Conway Corporation, Ray Martin, Superintendent of the Gleason Water Treatment Plant, Frank Robins, Chairman of the Conway Corporation Board of Directors, the Mayor, City Attorney and several Aldermen of the City of Conway, Mr. John Gill, Legal Counsel, Carl Stuart, Superintendent of the Conway Schools, several School Board members, including the Board's Chairman and Secretary and other interested Conway citizens.

12. After hearing the recommendations of Mr. Bennie McCoy and myself, the Board of Directors of the Conway Corporation unanimously voted to award the contract for the Gleason Project to the M. D. Limbaugh Company.

13. I can unequivocally state that, at no time did I bear any malice or ill will toward CEI or the Smiths. My concern was for the welfare of the citizens of the City of Conway and all of my actions were undertaken with that welfare in mind. I never acted in "bad faith" in requesting the McCoy investigation or in making my recommendation to the Board. I felt that, as a result of the investigation and of my knowledge of Florence Mattison School job, the award of our contract

to CEI would have had catastrophic consequences for our community. At all times relevant to this case I was merely doing my job as I saw it. My decision to recommend that CEI's bid be rejected was not made until after all of the information mentioned above was obtained and evaluated.

DATED this 22 day of March, 1988.

JAMES H. BREWER

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 22 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.
Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Stanley Russ, a resident of Conway, Arkansas, having been been first duly sworn, state on oath as follows:

1. I have known James H. Brewer, General Manager of The Conway Corporation and a resident of Conway, Arkansas, for over 35 years. I, of my own personal knowledge, know Mr. Brewer's reputation for truth and veracity to be unimpeachable. His character is

above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 9 day of March, 1988.

STANLEY RUSS

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Don Owen, a resident of Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a member of the City Council of the City of Conway, Arkansas, and have been for the past 7 years. In my capacity as a member of the City Council, I had discussions with James H. Brewer of The Conway Corporation in late June and early July of 1986, during

which time The Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice, as a member of the City Council, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of my knowledge of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that in my opinion, as a member of the City Council of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of my conversations with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of The Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

DON OWEN

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.
Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Maurice Moix, a resident of Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a member of the City Council of the City of Conway, Arkansas, and have been for the past 7 years. In my capacity as a member of the City Council, I had discussions with James H. Brewer of the Conway Corporation in late June and early July of 1986, during which time the Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice as a member of the City Council, with respect to whether the Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily the Florence Mattison School Project in Conway and the question of problems they might be having on the Morrilton Sewer Project, I advised Mr. Brewer that, in my opinion, as a member of the City Council of Conway, Arkansas, he should seek out information regarding those two projects to see if CEI were capable of completing the contract for the construction of the Gleason Project.

3. I know that, at the time of conversations

with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me for the purpose of acquiring my guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

MAURICE MOIX

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 9th day of March, 1988.

LOIS M. LEE

My Commission Expires 8-11-95

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Woodrow Cummins, a resident of Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a member of the City Council of the City of Conway, Arkansas, and have been for the past 5 years. In my capacity as a member of the City Council, I had discussions with James H. Brewer of The Conway Corporation in late June and early July of 1986, during which time the Conway Corporation was in the process

of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice as a member of the City Council, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that, in my opinion, as a member of the City Council of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of conversations with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

WOODROW CUMMINS

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.
Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, William L. Wright, a resident of

Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a former Mayor of the City of Conway, Arkansas, and was serving in that capacity in 1986. I served as Mayor for a period of 8 years. In my capacity as Mayor of the City of Conway, I had discussions with James H. Brewer of The Conway Corporation in late June and early July of 1986, during which time the Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought advice from me as Mayor of the City of Conway, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of my knowledge of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that, in my opinion, as Mayor of the City of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of my conversations with Mr. Brewer, he had not prejudged the

issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 7th day of March, 1988.

WILLIAM L. WRIGHT

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 7th day of March, 1988.

BETTY K. PEDEN

My Commission Expires May 6, 1991

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.
Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Jerry L. Maulden, a resident of Little Rock, Arkansas, and President and Chief Executive Officer of Arkansas Power & Light Company having been first duly sworn, state on oath as follows:

1. I have known James H. Brewer, General Manager of The Conway Corporation and a resident of Conway, Arkansas, for approximately 20 years. I, of my own personal knowledge, know Mr. Brewer's reputation

for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 7th day of March, 1988.

JERRY L. MAULDEN

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 7th day of March, 1988.

BETTY K. PEDEN
My Commission Expires May 6, 1991

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants Larry Graddy, Frank Robins, III, Luke Gordy, Bill Pate, Bob Clifton, and Leo Crafton III, as Members of the Board of Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, David Harrington, a resident of Little Rock, Arkansas, and Director of the Arkansas Industrial Development Commission, having been first duly sworn, state on oath as follows:

1. I have known James H. Brewer, General Manager of The Conway Corporation and President of the Arkansas Industrial Development Foundation, for many years. I, of my own personal knowledge, know Mr.

Brewer's reputation for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 7th day of March, 1988.

DAVID HARRINGTON

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 7th day of March, 1988.

CHERRY DUCKETT

My Commission Expires 9-18-89

IN THE SUPREME COURT OF ARKANSAS

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II and Defendants Larry Graddy, Frank Robins, III, Lou Gardy, Bill Pate, Bill Clifton, and Leo Crafton, III, as members of the Board of Directors of the Conway Corporation

Appellants/
Cross Appellee

vs. No. 89-34

Construction Engineers, Inc., Associated General Contractors of America, Arkansas Chapter, Michael Sutterfield and Catherine N. Rushing

Appellee/
Cross Appellant

PETITION FOR REHEARING

Comes now the Appellee, Construction Engineers, Inc., by and through its attorney, David A. Orsini, and for its Petition for Rehearing states:

1. This Court has denied Construction Engineers, Inc., the Appellee (hereinafter "CEI") the

right to due process of law protected by the Fourteenth Amendment to the Constitution of the United States.

A. CEI was denied the right to a fair trial by this Court's action in reversing and dismissing Appellee's causes of action, after trial *de novo*, with the Court's action being based almost entirely upon proffered affidavits and proffered testimony. No opportunity to object to inadmissible testimony or for cross examination existed as to either class of proffered testimony. This Court has thus prevented CEI from cross examining witnesses, and from having the opportunity to object to inadmissible testimony. CEI was denied its right to effective counsel by its lack of opportunity to object, to cross examine, or participate in any manner with regard to matters proffered below and then relied upon by this Court. These rights are fundamental rights which are protected by the Fourteenth Amendment and 42 U.S.C. §1983. Denial of these rights is a denial of both substantive and procedural due process rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 1187 (1905) (fundamental requirement of due process is opportunity to be heard at meaningful time and meaningful manner); *Adington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (function of legal process is to minimize risk of erroneous decisions); *Council of Federal Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964) (right of litigant to be heard is one of fundamental rights of

due process); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436 (3d Cir. 1965) (denial of right of cross examination of available witness deprives litigant of due process); *Ellis v. Capps*, 500 F.2d 225 (5th Cir. 1974) (denial of right of inquiry such as bias and prejudice of party is repugnant to principle of fair trial); *See, U.S. v. Dinitz*, 538 F.2d 12.4 (5th Cir. 1976), *cert. den.* 429 U.S. 1104, 77 S.Ct. 1133, 51 L.Ed.2d 556 (1977) (refusal to hear party by counsel in civil or criminal case constitutes denial of a hearing and therefore due process); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961), *cert. den.* 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 1981 (preparation of court's opinion by litigant's counsel without notice to opposing side amounts to denial of due process); *Bagby v. Beal*, 439 F.Supp. 1257 (M.D. Pa. 1977), *vac. as moot* 606 F.2d 411 (3d Cir. 1979) (due process includes a reasonable opportunity to be heard, including a statutory scheme which is intelligible to persons affected by it).

B. The proffered testimony of Appellants, Conway Corporation, Inc., Jim Brewer and all defendants except McCoy, consisting of statements of Dan Nabholz on the issue of *liability* was tendered *during the damage portion* of a bifurcated trial. No opportunity to cross examine or object to inadmissible testimony was given because only a proffer was being made. During the trial to determine liability, Appellants Conway Corporation, Inc. and James Brewer participated fully. Upon concluding their defense on liability, these defendants

rested. The trial court ruled on the liability issue. Only after having the opportunity to know the basis for the liability ruling of the trial court, an opportunity to see after the fact what issues might be deemed most significant, did Appellants Conway Corporation, Inc. and Jim Brewer proffer the testimony of Dan Nabholz and affidavits relied upon by this Court. It should be noted that the affidavits of all appellants except McCoy were presented *after all* testimony in the *entire trial* was concluded. This Court's allowance of this untimely evidence and reliance upon it without permitting cross examination, or the right to object, and to the exclusion of the trial testimony, deprived Appellee, CEI of the fundamental right to a fair trial.

C. As shown by the abstracted material beginning on page 112, the proffer of Brewer admits the trial court has decided liability and ruled further evidence of liability was to be inadmissible during the trial on damages. No confusion existed in these appellants' minds as to the evidence to be presented at either trial. The proffer states it is a proffer on *liability* by way of affidavits. Because the proffer was untimely, and because it was by affidavit, and because all testimony was concluded and the affidavits were not presented until the trial was concluded, there was no opportunity for cross examination, for objection such as to hearsay, or for any participation by counsel for Appellee. Because this Court now credits this proffered testimony, these omissions seriously prejudice CEI's right to a fair trial,

when such evidence, without right to trial, was considered and relied upon by this Court. For example, the affidavit of Elaine Goode, accepted by this Court as true, contains hearsay and hearsay within hearsay. Her testimony would not have been admissible if she had appeared in a timely manner and attempted to testify. Such error demonstrates the seriousness of the deprival of due process. The proffer (Ab. 112, 113, 114, Tr. 863, 864) offers more testimony of Carl Stewart on the issue of liability when, in fact, Mr. Stewart had already testified and given testimony damaging to appellants on cross examination. The proffer, made after conclusion of the trial, is an untimely attempt to bolster trial testimony without allowing further cross examination. For the Court on trial *de novo* to rely upon such affirmations and in effect allow its admission into evidence as evidence post trial, has resulted in an entirely new trial in which CEI was not allowed to participate. The affidavit of Jim Brewer offers more testimony on the issue of liability although Appellant Brewer had testified during the trial. This time, however, the affidavit asserts hearsay and further summaries of his version of events without cross examination or the opportunity to object to hearsay. The affidavits of the other individuals in the post trial proffer were, of course, untimely and offered on the issue of liability. No explanation was given for not offering this testimony in a timely manner during the liability portion of the trial. Some of the affidavits are based on hearsay, some express opinions upon the ultimate conclusion of good faith/bad faith; however, most are contrary to

Appellant Brewer's testimony as to whom he discussed problems with and what he was told. (Ab. 312, Tr. 2364, 2541) These defects demonstrate the extent of harm to CEI's right to due process, such harm resulting in a complete denial of a right to procedural and substantive due process caused by the lack of opportunity to object, the lack of opportunity to cross examine, and the lack of meaningful participation of counsel to challenge the evidence or offer counter testimony, or to impeach the testimony.

D. Appellant McCoy proffered certain testimony by affidavit as shown beginning on (Ab. 242, Tr. 2992, 2993). He proffers the affidavit of William J. Driggers, Sr. Not only is the proffer untimely, but the proffer of this witness shows it is in effect an attempt to substitute the witness for the trial judge. This affiant states he reviewed the deposition of McCoy and was given general information in the lawsuit. Having qualified himself as a judge, this affiant finds that Appellant McCoy did not act in bad faith. While the rules permit some comment by witnesses upon the ultimate issue, this testimony would not have been admissible. Cross examination certainly would have disclosed the basis upon which this witness was relying and would have disclosed any errors or misinformation he had been furnished in forming his opinion as a judge. Without cross examination and without the right to object, CEI had no trial on this portion of the evidence.

The same is true of the affidavit of Robert Schultz. Although Mr. Schultz is an attorney, his testimony should have been subject to cross examination. It should have been timely presented and the basis upon which he was relying could have been exposed as to any weaknesses.

The trial *de novo* of this Court has allowed the introduction as evidence of untimely affidavits, which were a mere proffer of proof. It is error to admit evidence that is as untimely as is the proffer here. The Court has credited the affidavits and the proffer of Dan Nabholz liability testimony over 6 days of trial testimony together with supporting exhibits by all parties. The Court has thus excluded CEI from participating in the only part of the trial this Court finds significant. The Court has denied CEI its right to trial and to due process of law.

2. In finding the chancellor's findings of bad faith clearly erroneous, the affect of the Court's reliance upon the untimely proffers of proof, conclusively demonstrates the prejudice to CEI. At the same time, the Court failed to give proper weight to the evidence which *supports* the chancellor's findings. For example, the chancellor found CEI was qualified to build the project. This finding is not challenged. Defendant *McCoy* testified the quality of CEI's work was not being questioned. (Ab. 288, Tr. 2430) While this testimony is overlooked by the Court, it is directly contrary to the

allegations of poor workmanship in the affidavits. Further, the allegations of poor workmanship in the affidavits is contrary to the school architect's testimony, which architect testified for the appellants. He placed the blame for problems on his own specification and on trouble with subcontractors. (Ab. 310, 311, Tr. 2535, 2536) He did not state poor workmanship was one of the problems.

Most significant is the trial testimony of appellant Brewer shown on Ab. 312:

> My concerns with regard to CEI were based on my knowledge and understanding of the problems they had with coordinating work of subcontractors on the Mattison School project and some problems that seemed to be apparent with the Morrilton sewer project. I read *newspaper* articles and discussed through the years with *members* of the *school board* and *superintendent* of the School. (Ab. 312) (Emphasis added)

This proffer of testimony which indicates problems with subcontractors was consistent with the testimony of the architect Dan Stowers as to subcontractor coordination. It is, however, inconsistent with the matters set forth in the affidavits. No mention at trial was made of discussion with city council members or a mayor. The plain truth of the matter is that the

affidavits are so full of hearsay and of information that cannot be substantiated, the testimony would not have been admissible in a large part, and any remaining parts would have been incredible.

The evidence to support the findings of the chancellor are set out in the abstract and brief of Michael Sutterfield and Catherine Rushing, beginning on Page 6 and will not be repeated in this petition. However, such matters are incorporated herein by reference and clearly demonstrate the chancellor's finding is not clearly erroneous.

The trial *de novo* conducted by the Court in the instant case abandons the standards set forth in *Looper v. Madison Guaranty Savings & Loan Association*, 292 Ark. 255, 79 S.W.2d 156 (1987). In *Looper*, the Court held it does not retry cases, but sits as an appellate court. In the instant case, the Court has in fact retried the case *de novo*. In *Looper* a holding was made that the appellate court does not consider what it would have done, but whether discretion was abused. This Court abandons that standard and substitutes its own decision as to what should have been done.

By way of example, while the Court's opinion purports to demonstrate error in the chancellor's findings regarding McCoy's reliance on the Conway County Water Plant structure, the Court omits appellant McCoy's testimony which states Brewer was aware of the

problem in *May:*

> Before the China trip, Mr. Brewer expressed his concerns. . . . It was in those early conversations with Mr. Brewer that the Conway County Water Distribution project in May was mentioned. (Ab. 288)

No question came up about the structure until the first of August. (Ab. 355, Tr. 1133) The testimony of the engineer Threet was to the effect he did not recall discussing the structure with McCoy, meaning he *did not do so.* Drawing all inferences in favor of the testimony to support the chancellor's findings, testimony and the record and inferences support the chancellor. This Court, however, abandons *Looper* by examining evidence contrary to the trial court's finding rather than the evidence and inferences which support that finding.

3. I, David A. Orsini, certify that it is my belief that there is merit in this petition and that it is not filed for the purpose of delay.

CONCLUSION

We respectfully submit that the foregoing justifies the granting of this Petition for Rehearing and trust that the Court will agree.

Respectfully submitted,

DAVID A. ORSINI
Attorney for Appellee
212 Center Street, Suite 700
Little Rock, Arkansas 72201
(501) 376-4242

IN THE SUPREME COURT OF ARKANSAS

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II and Defendants Larry Graddy, Frank Robins, III, Lou Gardy, Bill Pate, Bill Clifton, and Leo Crafton, III, as members of the Board of Directors of the Conway Corporation

Appellants/
Cross Appellee

vs. No. 89-34

Construction Engineers, Inc., Associated General Contractors of America, Arkansas Chapter, Michael Sutterfield and Catherine N. Rushing

Appellee/
Cross Appellant

PETITION FOR REHEARING

Comes now the Appellee, Associated General Contractors of America, Arkansas Chapter and Intervenors, Michael Sutterfield and Catherine N. Rushing, by and through their attorneys, and for their Petition for Rehearing state:

1.

The Petition for Rehearing of Construction Engineers, Inc. is adopted in its entirety by these appellees and is incorporated herein by reference.

2.

The denial of due process by this Court's action is more fundamental as to Associated General Contractors of America, Arkansas Chapter, (hereinafter "AGC") for the reason that the AGC, although a full party, was excluded from participating in the damage portion of the trial wherein the proffer of Nabholz's testimony was made, and appellant McCoy's proffer was made. Of course, the affidavits of all defendants except McCoy were not made until even after conclusion of that trial. AGC and its counsel were excluded on motion of appellants, which motion objected to AGC and its counsel participating in the trial on damages since only issues of damages were to be heard, a matter in which the AGC had no interest.

The affidavits and proffers upon which this Court relies to reverse the liability holding and the finding of bad faith are matters upon which AGC and Intervenors, Sutterfield and Rushing have been denied their day in court.

I, Janice Vaughn, certify that it is my belief that there is merit in this petition and that it is not filed for the purpose of delay.

Respectfully submitted,

JANICE VAUGHN
WALLACE, DOVER & DIXON
425 W. Capitol Street
Suite 3800
Little Rock, Arkansas 72201
Attorney for Associated General Contractors of America, Arkansas Chapter

No. 89-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSTRUCTION ENGINEERS, INC.,
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, ARKANSAS CHAPTER, MICHAEL
SUTTERFIELD AND CATHERINE N. RUSHING,

Petitioners

v.

THE CONWAY CORPORATION,
JIM BREWER AND BENNIE J. MCCOY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' JOINT BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Construction Engineers, Inc. ("CEI") initiated the litigation from which this Petition arises in 1986 in an effort to be instated in a public works contract let by public bid by respondent the Conway Corporation, a non-profit corporation chartered by the City of Conway, Arkansas to own and operate public utilities within the City. CEI also sought, alternatively, to recover damages for the profit that it allegedly would have earned on the contract. The Conway Corporation had rejected CEI's low bid for the contract for cause and awarded the contract to the second low bidder. The trial court, the Pulaski County, Arkansas Chancery Court, awarded CEI judgment against those defendants who are respondents to this Petition. This Petition is in response to the reversal of that judgment by the Arkansas Supreme Court.

The petition is predicated on the Arkansas Supreme Court's alleged reliance on proffered testimony in support of its decision to reverse the judgment. Although not mentioned in the Petition, much of the evidence received at the trial level was presented before a special master appointed to determine CEI's claims for preliminary injunctive relief. The special master entered proposed findings that the preliminary injunctive relief should not issue because CEI had no probability of success on the merits of its claim, because the Conway Corporation had a reasonable basis for the rejection of

CEI's low bid for the public works contract, and because all defendants, including the respondents herein, had acted in good faith with regard to the rejection of CEI's bid.

Instead of accepting or rejecting the special master's findings as required under Arkansas law, the chancery court accelerated the hearing on permanent injunctive relief and heard evidence on that issue. Respondent McCoy was excused from that hearing. At the conclusion of the hearing, the chancery court entered findings of fact and conclusions of law finding, among other things, that the respondents herein, including McCoy, were liable in money damages to CEI. The chancery court then set for hearing the amount of money damages.

The respondents herein appealed the judgment of the Pulaski County, Arkansas Chancery Court to the Arkansas Supreme Court. The points of error presented to the Arkansas Supreme Court included, among others, that the chancery court erred in refusing to adopt the proposed findings of the special master and that the chancery court's findings were clearly erroneous. After reviewing the record of evidence before the special master and the chancery court, the Arkansas Supreme Court reversed and dismissed the judgment of the chancery court on those grounds. In essence, this petition is predicated on the sufficiency of the evidence to support the decision of the Arkansas Supreme Court.

No. 89-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSTRUCTION ENGINEERS, INC.,
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, ARKANSAS CHAPTER, MICHAEL
SUTTERFIELD AND CATHERINE N. RUSHING,

Petitioners

v.

THE CONWAY CORPORATION,
JIM BREWER AND BENNIE J. MCCOY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' JOINT BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The opinion of the Arkansas Supreme Court from which this writ is sought did not reach or decide any question of federal law. The opinion reversed the trial court's judgment against the respondents and

dismissed the action on the grounds that the findings of the trial court were clearly erroneous. The opinion of the Arkansas Supreme Court is supported by the evidentiary record and, as expressly stated by the court, was in no way based on proffered testimony.

ARGUMENT

I. THE PETITION STATES NO GROUNDS WHICH WARRANT A REVIEW ON WRIT OF CERTIORARI

Rule 17 of the Rules of the Supreme Court provides that the discretionary writ of certiorari will only be granted when "special and important" reasons are shown in support of the petition. Rule 17 also provides illustrations of reasons that are "special and important":

. . .

> (b) when a state court of last resort has decided a federal question in a way to conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has

> decided a federal question in a way to conflict with applicable decisions of this Court.

The Petition is predicated on no such "special and important" reasons, and the petitioner does not even attempt to state "special and important" reasons for which the Petition should be granted.

Moreover, the petitioners have not shown that the Arkansas Supreme Court decided any question of federal law. *See also* 28 U.S.C. §1257(a). The petitioners argue that the court's opinion reversing the trial court was wholly based on proffered evidence for which the petitioners were denied the right of cross-examination. The Petition rests on one ambiguous statement in a footnote to the court's original opinion. (Petition at A-20.) In response to the entry of the original petition, the petitioners filed motions for reconsideration, which likewise alleged that the court's opinion was wholly based on proffered evidence. The Arkansas Supreme Court thereupon clarified the offending footnote by indicating that the opinion was "based on the evidence considered by the master and the chancellor."[1] (Petition at A-9.) The Arkansas Supreme Court never determined whether due process under

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[1]It is noteworthy that since the Arkansas Supreme Court expressly stated in its substituted opinion that no proffered testimony was considered (Petition at A-9 n.2), the petitioners must maintain that the court was academically dishonest in its substituted opinion in order to logically maintain that the court did in fact rely on proffered testimony.

Amendment XIV to the United States Constitution precluded an appellate court reviewing a trial court's findings *de novo* from reviewing proffered testimony. The substituted opinion from which this writ is sought was limited to the sufficiency under Arkansas law of the evidentiary record in support of the trial court's judgment and neither decided nor implicated any question of federal law.[2] (Petition at A-11 to A-12.)

II. THE PETITION IS PREDICATED ON THE FACTUAL FINDINGS OF THE ARKANSAS SUPREME COURT AND THE INFERIOR PULASKI COUNTY, ARKANSAS CHANCERY COURT.

The Arkansas Supreme Court reversed the judgment of the chancery court because its findings were clearly erroneous and because the chancery court erroneously rejected the master's proposed findings. Under Ark. R. Civ. P. 53(e)(2), an Arkansas trial court "shall accept the master's findings of fact unless clearly erroneous." The chancery court in this action did not review the record of the proceedings before the special master, but instead accelerated the hearing on permanent injunctive relief and entered findings of fact completely inconsistent with the findings of the

---

[2]The petitioners have not cited a single federal case discussing the requirements of due process for the de novo review of a trial court's findings of fact by a state appellate court. The petitioners have clearly not shown that the opinion from which this writ is sought conflicts in any way with the decisions of another court.

special master. The Arkansas Supreme Court's opinion was entered upon a review of the entire record of evidence, including evidence from the proceedings before the special master and before the chancery court. (Petition at A-9 n.2.)

The petitioners argue that no evidence in the record supports the Arkansas Supreme Court's decision and therefore that the court must have relied on proffered evidence in reaching its decision. The petitioners' argument is affirmatively misleading and ignores the evidence in the record. In their statement of the case, for example, the petitioners cite several factual findings of the Arkansas Supreme Court that are allegedly either supported only by proffered testimony or are unsupported by any portion of the record, including proffered testimony. The record squarely contradicts the petitioners' argument.

First, the petitioners claim that the Arkansas Supreme Court's description of a previous construction contract between the Conway Corporation and CEI as a small subcontract was incorrect and supported only by proffered testimony. (Petition at xii.) However, during the hearing before the special master, Mr. James Brewer, the general manager of the Conway Corporation, testified that the previous project performed by CEI was a small project, costing less than $35,000, and that the Conway Corporation furnished all materials to CEI, thereby performing what is usually a contractor's role.

(Respondents' Appendix at A15-A16.) From this testimony, the court could clearly conclude, and the respondents so argued, that CEI was merely acting as a small subcontractor on the previous project.

Second, the petitioners claim that neither the record nor the proffers of evidence support the court's finding that certain notes which allegedly impeached Mr. Bennie McCoy's testimony were written by Mr. McCoy for his own use and preparation for a deposition. (Petition at xii-xiii.) The petitioners' contention is clearly wrong. When cross-examined about the notes at the hearing before the special master, Mr. McCoy testified: "It was a log that I prepared to organize my files and develop some chronology prior to your taking of my deposition." (Respondents' Appendix at A11-A12.)

Third, the petitioners maintain that proffered evidence provides the only basis for the court's statement that Mr. James Brewer's concern about CEI's ability to perform the public works contract was founded upon information received from a local school superintendent and local newspapers and concerned problems with plumbing, cabinet work and windows in a school building constructed by CEI. (Petition at xiii.) However, the testimony elicited from Mr. Brewer before the special master clearly shows that his sources included the school superintendent and the local newspapers. (Respondents' Appendix at A13, A18.) On cross-examination before the special master, Steve Smith, the President of CEI,

admitted problems with the plumbing, windows and cabinet work in the school building and confirmed that the local newspapers had written about those problems. (Respondents' Appendix at A20-A29.)

Fourth, petitioners also argue that there was no basis for the Arkansas Supreme Court's finding that after listening to information and recommendations by James Brewer, the Board of Directors of the Conway Corporation was unanimous in its decision to reject CEI's bid for the contract. (Petition at xiv.) However, the unanimous vote following Mr. Brewer's presentation is in the record and in the minutes from the board meeting, which were received into evidence. (Respondents' Appendix at A16-A19, A30-33.)

Likewise, in their argument supporting the grounds for the issuance of a writ of certiorari, the petitioners state that the evidence of poor workmanship on previous projects, which formed, in part, the basis of the Conway Corporation's rejection of its bid for the public works contract, is absent from the record. (Petition at 6.) This is clearly untrue. The problems with CEI's previous projects were stated repeatedly throughout the record. In fact, the majority of their problems were testified to by CEI's president, Mr. Steve Smith. These involved a wide variety of complications in at least two projects, including CEI's failure to use specified materials in the construction of a school (Respondents' Appendix at A21), improper plumbing in

the school (Respondents' Appendix at A23), improperly placed insulation in the school (Respondents' Appendix at A25-A26), improperly installed ceiling tiles in the school (Respondents' Appendix at A25-A27), failure to pay subcontractors timely (Respondents' Appendix at A28), failure to meet milestones on contracts for the construction of a sewage treatment facility (Respondents' Appendix at A11) and a "paper war" with the consulting engineers on the sewer project (Respondents' Appendix at A10-A11.).

In addition, the petitioners specifically argue that the testimony of the architect for the previous school construction project contradicts any inference of poor workmanship by CEI. (Petition at 6.) The school architect testified during the hearing before the special master that CEI did not properly manage its subcontractors (Respondents' Appendix at A5-A6), that the project was far from complete at the scheduled date of completion (Respondents' Appendix at A8-A9), and that overall it was his "worst experience" with a general contractor (Respondents' Appendix at A7).

The remainder of the Petition consists of rambling, inconsistent allegations that are not only irrelevant to the asserted grounds for issuance of certiorari, but are without any factual basis. The Arkansas Supreme Court's reversal of the judgment entered by the chancellor is clearly supported by the record. Because the Arkansas Supreme Court did not

rely on the proffers of proof, determining whether such reliance offends due process of law would require an advisory opinion of this Court.

III. THE PETITION LACKS MERIT UNDER THE LAWS OF THE STATE OF ARKANSAS AND THE DECISIONS OF THIS COURT

Petitioners cite nine decisions from the federal courts in support of their argument that the Arkansas Supreme Court's *de novo* review of the record on appeal from the chancery court denied it due process of law. None of the cases cited by petitioners in support of their argument involve an appellate court's review of the evidentiary record supporting a chancery court's findings of fact. The Arkansas Supreme Court has always recognized as a tenet of equity jurisprudence that the record from chancery courts is subject to *de novo* review on appeal.[3] *See Woodruff v. Core*, 23 Ark. 341, 346 (1861).

Additionally, the Petition is without merit under the holdings of the cited cases. *See, e.g., Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

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[3]Under Arkansas chancery practice and procedure, all trials are to the chancellor and no right of jury trial exists in that court.

In both *Addington* and *Armstrong*, a state court had determined a case on grounds that clearly involved the right to due process or law. In *Addington*, the question involved the standard of proof required by due process to civilly commit an individual, thereby depriving him of his liberty. 441 U.S. at 423-26. Obviously, the resolution of this question would be of major importance in every state. In *Armstrong*, the Court was presented with the failure to give adequate notice of a hearing which it held to be an obvious violation of "the most rudimentary demands of due process of law." 380 U.S. at 550. This issue would also be of significance to similar situations in every state. Unlike *Addington* and *Armstrong*, the case at bar does not involve a question of national importance, but merely involves the adequacy of the evidentiary support for the decision of the Arkansas Supreme Court.

Additionally, the uniqueness of this particular chancery case makes it inappropriate for review by writ of certiorari. The parties understood that the hearing before the chancery court was to be limited to the issue of permanent injunctive relief. (Petition at A-9, n.2.) However, at the conclusion of the hearing, the chancellor summarily rejected the proposed findings of the special master, entered completely inconsistent findings, and found liability for monetary damages against the respondents, including Mr. McCoy who had been excused from the hearing, without hearing evidence on the issue of liability for damages. The chancellor's

abrupt action necessitated the proffers of evidence to which the petitioners object. Clearly, the proffers of evidence was the result of an unusual chain of events which does not often occur. As stated by Chief Justice Taft, it is very important that the Court "be consistent in not granting the Writ of Certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 442, 67 L.Ed.2d 12 (1923). The present case does not command such public importance.

In the Chancery Court of Pulaski County, Arkansas
First Division

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy, John Doe I, John Doe II, and Defendants, Larry Graddy, Frank Robins, III, Lou Gardy, Bill Pate, Bob Clifton and Leo Crafton, III, as Members of the Board of Directors of The Conway Corporation

Defendants

MASTER'S FINDINGS AND CONCLUSIONS

On March 24, 1987, Plaintiff, Construction Engineers, Inc.'s petition for a restraining temporary order and preliminary injunction came on for hearing at the appointed time; Plaintiff, Construction Engineers, Inc., appearing by David A. Orsini, its attorney, and Stephen and Danielle Smith, as corporate representatives; Bennie McCoy, appearing in person and by his attorneys, James M. Moody and Roger Rowe; The Conway Corporation, M. D. Limbaugh Construction Company, Jim Brewer, Larry Graddy, Frank Robbins, III, Lou Gardy, Bill Pate, Bob Clifton, and Leo Crafton, III, appearing through their attorneys, Michael G. Thompson and Michael G. Smith, and through Jim

Brewer and Michael Limbaugh. Special Master John Plegge, appointed by Order of this Court, heard the evidence and arguments of counsel, and recommends that the Court adopt the following findings of fact and conclusions of law:

1. The test for issuing a preliminary injunction involves consideration of four factors: (1) the threat of irreparable harm to the movants; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) probability that movant will succeed on the merits; and, (4) public interest.

2. The Plaintiff has failed to meet its burden of proof that it will suffer irreparable harm if an injunction is not issued. Any harm which the Plaintiff alleges it has suffered may be remedied by an award of monetary damages. The evidence presented at trial is insufficient to show the irreparable harm to the plaintiff which necessarily must be shown for the issuance of a preliminary injunction.

3. The harm which The Conway Corporation and the M. D. Limbaugh Construction Company will suffer if an injunction was issued far outweighs any harm to be suffered by Plaintiff if the injunction is not issued. The harm to be suffered by the Defendants herein is potentially much greater than that alleged by the Plaintiff. The evidence and testimony adequately support this

finding.

4. Plaintiff has not shown a probability of success on the merits of its claim. *Ark. Stat. Ann.* §14-612 applies and gives The Conway Corporation discretion in awarding bids. Jim Brewer, Bennie McCoy, and the Board of Directors of The Conway Corporation acted in good faith and had a reasonable and rational basis for determining that the second low bidder was the lowest *responsible* bidder. Further, the Board had discretion and acted in good faith in determining in its opinion that it would serve the best interests of the taxing unit to award the contract to the Limbaugh Company.

5. The public interest would be adversely affected by the issuance of the requested injunction. The City of Conway has had to resort to voluntary rationing of water in previous Summers when water usage was highest. Now, because of the construction, the maximum capacity of the water system has been reduced substantially. If construction were halted at this time, there would be a serious danger that Conway would experience severe water shortages in the coming Summer. The harm to the public which would result from the issuance of an injunction halting the project outweighs any private harm to the Plaintiff which may result from not issuing it. Furthermore, the harm to the taxpayers of Conway which would result from issuing the injunction far outweighs the harm Plaintiff contends they would suffer if the contract is allowed to proceed.

6. The Plaintiff has waived its right to seek an injunction by failing to seek a timely hearing on the issue. The contract was let and Construction Engineers notified that its bid had been rejected on July 7, 1986. Suit was not filed to enjoin the construction from proceeding until August 20, 1986. After suit was filed, Plaintiff did not seek a hearing on the injunction issue until late October, 1986. At that time, the Honorable Judith Rogers (in whose Court the action was then pending) notified the Plaintiff that she could not hear the case until after January 1, 1987. Judge Rogers offered to appoint a Special Master if the Plaintiff so requested, but the Plaintiff did not make such a request. Judge Rogers also notified Plaintiff that if it had sought a hearing when suit was filed, it could have received an earlier hearing. Plaintiff elected to wait until Judge Rogers could hear the case personally, and a setting of March 19, 1987, was made. Judge Rogers was not able to hear the case on March 19 due to illness, and the case was transferred to this division, whereupon a Special Master was appointed. At the time of the hearing, the contract was already 17% complete. It is obvious that the pre-litigation *status quo* cannot be maintained nor restored by the issuance of an injunction at this late date.

The foregoing contains my findings of fact and conclusions of law and is recommended to the Court for adoption as the Order of this Court on this the 14th day of April, 1987.

JOHN B. PLEGGE
Special Master

TESTIMONY OF DAN STOWERS IN THE PROCEEDINGS BEFORE THE SPECIAL MASTER

Dan Stowers, having been previously duly sworn on oath, testified as follows: . . .

A. McCoy did call me and I responded—

Q. What did he ask you? What did he say?

A. He asked—he said that he was doing some follow-up work, which we normally do on our contractors when they bid our projects, and he needed a reference for CEI. And I kind of chuckled and we talked a little bit and I told him that CEI had not performed well on Florence Mattison school in Conway. We had had several problems and he didn't really want to hear all of that, he didn't have time to do that. But basically we had four or five subcontractors that had not performed well and that became a great issue in our contract.

But I cautioned him a little bit because, on the surface, CEI—the owners, Steve and Danielle, are very, very qualified. As a matter of fact, I'm amazed that

they would locate in Arkansas. They both have a Master's degree in engineering, they have a contractors' license, they have the ability to bond, and I think I used the term that they were both smarter than a tree full of apples. My experience had been that, one thing, even though you have a contractor's license, it does not indicate integrity. A contractor receives a fee for being a general contractor. He signs up to do and perform a certain task for an owner who does not have the people available to him for construction. And it seemed like to me that CEI took the attitude that they had signed contracts to sublet their contracts. They probably did maybe 75 to 80 percent of their work under subcontracts, leaving on [sic] a very minor portion of the construction work to their disposal. And any time that they had a problem with a subcontractor, they simply side-stepped the issue, simply turned that issue back to the owner. We are not accustomed to that here in Arkansas.

If you have a stable contractor, most general contractors assume responsibility for their subcontractors, and a Nabholtz or a Starkey, which are both contractors located in the City of Conway, would assume the responsibility and kind of take the burden on themselves. And that's a part of their fee, to isolate the owner from the problems of subcontracting. Other than that, I didn't have anything else to add.

Q. Did you make a recommendation, though, to him regarding—

A. No, I really didn't, inasmuch as I said that things could have changed, CEI could have bought additional equipment, and their performance could have changed. And I said he needed to investigate that matter.

Q. But you didn't recommend them based on your previous experience.

A. (No response.)

Q. Did you make a statement to Mr. McCoy that this experience with the Florence Mattison School and CEI was the worst experience you ever had in your life with a contractor?

A. I think I said that it was not one of my most pleasant experiences, yes, sir. . . .

Cross-Examination

Q. Mr. Stowers, do you remember when the substantial completion date was for the school?

A. The substantial completion was issued in two portions: one for a very minor section that was to house a specified type of child and learning disability type student, and another one for the major portion of the work. And I believe that that was later turned over to litigation. I'm not certain that that second one was ever

signed.

Q. Do you remember when substantial completion was set in the project, when it was supposed to be? Excuse me, do you remember when the completion date was supposed to be for the project?

A. The completion was supposed to have been in November, around November. I looked at the dates. The contract was $1,467,000, the work order was issued on 9/2 of '80, which 365 days was the contract limit. I did not go into my files and investigate when the—

Q. Substantial completion date was a year later, September 2 of '81?

A. Correct.

Q. Two buildings, Building A and Building B?

A. (Witness nods head in response.)

Q. Wasn't one building accepted in August and one building accepted on September 2?

A. With a substantial amount of work to be completed.

Q. But substantial completion was accepted on those two dates, was it not?

A. That was someone else's testimony. I would not agree to that.

Q. What if it was a statement—

A. Let me—you are proper in your term of substantially complete, inasmuch as the owner had to take over the building because of the children coming into the school district in September. There was, again, an incredible amount of work to be completed, but the owner had to take the project . . .

TESTIMONY OF BENNIE J. McCOY
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Bennie McCoy, having been previously duly sworn on oath, testified as follows:

Q. Would you state your name for the record?

A. Bennie J. McCoy.

Q. By whom are you employed, Mr. McCoy?

A. Crist Engineers, Incorporated, Little Rock.

Q. What is your position?

A. I'm President of the firm.

Q. How long have you been with Crist Engineers?

A. It will be 30 years this coming August.

Q. Your firm has an engineering contract for the Gleason project that's under litigation today?

A. Yes, sir.

Q. You've been sitting in the courtroom thus far, have you not?

A. I've been here all day, yes, sir.

Q. And you've heard both this current project being talked about and the 1984 project being talked about. . . .

Q. What did Mr. Lloyd tell you, then, about the nature of the project or the work? What information did you gain from him that was valuable to you in what you were doing?

A. I think that's the first time the remark was

made about a paper war between the Mehlburger firm and CEI.

Q. Did he tell you there was a paper war?

A. Did he tell me that?

Q. Yes.

A. Yes.

Q. Did he say there was a paper war or there perhaps might be one? What did he say?

A. My recollection is that he said that—the phraseology "paper war," those were his words. He said, "We're in a paper war," or "It looks like we're going into a paper war," or "There is a paper war."

Q. What else?

A. That they had missed, at that point in time, I think he mentioned several milestones in their production. . . .

Q. Look at these notes here. That's your handwriting, is it not?

A. These are absolutely my notes, Mr. Orsini.

Q. They are the recollection you chose to write at the time with regard to this Larry Lloyd/Fred Oswald visit.

A. Yes.

Q. Look at the next page of the notes. Do you see those?

A. Yes.

Q. Those having to do with conversations you had with Bill Graham?

A. Yes, sir.

Q. And reflect the results of your investigation there.

A. Yes.

Q. And I also notice the very first page, Paragraph 5.

A. Yes.

Q. What is this first page? It's typewritten. What does it purport to be?

A. It was a log that I prepared to organize my

thoughts and develop some chronology prior to your taking of my deposition.

TESTIMONY OF JIM BREWER
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Jim Brewer, having been previously duly sworn on oath, testified as follows: . . .

Q. You had some concerns, did you not, Mr. Brewer?

A. Yes.

Q. Do you know if anyone else on the board of The Conway Corporation had any concerns?

A. Oh, not really. I don't know.

Q. And what were your concerns based on?

A. The publicity surrounding the Mattison school project, the many conversations back through several years there with members of the school board; Carl Stewart, the superintendent. And then the incident of the school project, that had some bearing on it, too, Mr. Orsini. There's a couple of members of the City Council in Conway who had knowledge of that Morrilton project and expressed some concern about it.

Q. Let me limit my questions, Mr. Brewer, to the point in time of the conversation we're having, this very first conversation you're having with Roger Mills and McCoy.

A. I can't pinpoint a single conversation that I had with these people. I visit with them on a daily basis, Mr. Orsini. . . .

Q. Did you have any knowledge about Morrilton, the Morrilton project?

A. My knowledge was through an alderman there in Conway.

Q. At the point in time that you gave him the letter—I'm not sure you're answering me straightforward—did you give McCoy anything other than this letter, any other information about CEI to use?

A. I don't recall anything, Mr. Orsini. You might want to refresh my memory there on something.

Q. Did you intend for McCoy to rely on this letter?

A. Well, what do you mean by rely on that letter?

Q. You're giving this to him as part of his

investigation. Did you intend for him to rely on it or use it in the investigation in any way?

A. Well, this serves as a statement from the school superintendent, I presume, representing the owner on that project.

Q. Look at Page 39 of your deposition. Do you see Line 2 at the top?

A. Yes.

Q. The question was, "What was the purpose of giving the letter to McCoy.["] Do you see your answer, "To have for his file"?

A. To have for his file, yes, sir. . . .

Q. In the past experience with CEI, did they do good work, did they do bad work on their Conway Corporation Gleason?

A. That little project they did for us was acceptable, yes.

Q. You characterized it as a little project. The City supplied the materials—

A. Our contract with Steve was something less than $35,000 and we consider that pretty small. A

project like that, Mr. Orsini, has a lot of risk factor in it, in that you've got to try to do it in a short time frame. And in that respect, similar to this project, but otherwise, it's not. As you've heard from testimony this morning from Steve, one of the real problems that contractors have in meeting time frames on projects is delivering materials. We took that risk out of that project completely by furnishing all the materials to the contractor. We took all of that responsibility. . . .

Q. And you are the General Manager?

A. Yes.

Q. How long had you been the General Manager of Conway Corporation?

A. Since 1965.

Q. And are part of your duties and responsibilities to make recommendations to the Board of Directors?

A. Yes, sir.

Q. But you don't sit as a Director on the Board; is that correct?

A. No, sir.

Q. Has Conway experienced water problems in the past few years?

A. Yes, sir. Conway is growing at a rather significant rate from, oh seven to ten percent a year, I guess, over the past several years. In 1985, the water demand went upward from '84 and we experienced a shortfall in capacity. In other words, the demands of the city for water exceeded the capacity of the plant to produce water. But by the cooperation of the people in the use of water in somewhat restricting usage, we made it through that summer. The same thing in '86.

Q. You had to ask the general public to voluntarily ration. Is that what you're saying?

A. Yes, curtailed usage, right.

Q. Based on your experience as a General Manager of Conway Corporation, do you see any problems this summer?

A. Yes. Our city has grown about another seven percent in the past year. The water usage has grown ten percent. If we don't have that plant on the line by the peak period of this summer, we will experience a shortfall of water in the neighborhood of 25 percent of need, which is very significant. We will have to ration water.

Q. Now, you had some concerns, you've already stated, with regard to CEI when you discovered that they had checked out the bidding documents; is that correct?

A. Yes, sir.

Q. What were those concerns based on?

A. They were based on our knowledge and understanding of the problems they had with coordinating work of subcontractors on the Mattison school project and some problems that seemed to be apparent with the Morrilton sewer project.

Q. Had you read newspaper articles?

A. Yes, sir, yes, sir. I read newspaper articles I'd discussed through the years there with members of the school board and the Superintendent of the school.

Q. Let me hand you a couple of documents and ask you if you can identify them. The first one is marked Defendant's Exhibit Number 3.

A. Yes, sir, I believe this is a proof of publication.

Q. Showing the advertisement for bids.

A. Yes, sir, on the waterworks improvement project, the Gleason project.

Q. And Defendant's Exhibit Number 4.

A. This appears to be copies of our board meeting of July 7, 1986, with attachments, yes, sir.

Q. And that is the board meeting where the contract was awarded to Limbaugh?

A. Yes, sir, that is the meeting where the board heard my recommendation and reviewed the pertinent information and authorized the manager to do certain things, including giving the contract to the second low bidder. . . .

Q. Did you ever talk to anybody prior to the award of the contract on July 9th? Did you ever talk with anybody up at the Morrilton sewer project?

A. No, sir.

Q. So whatever you heard about the Morrilton sewer project came from what source?

A. A couple of aldermen as I recall.

Q. There in the City of Conway?

A. Yes, sir. . . .

TESTIMONY OF STEVE SMITH
IN PROCEEDINGS BEFORE THE SPECIAL MASTER

Steve Smith, having been previously duly sworn on oath, testified as follows:

Q. Would you state your name for the record, please?

A. Steven Smith.

Q. Where you live, Mr. Smith?

A. I live in Russellville.

Q. By whom are you employed?

A. Construction Engineers, Incorporated.

Q. In what capacity?

A. I'm the President.

Q. Is your wife here in the courtroom today?

A. Yes.

Q. Is she also an officer?

A. Yes, she's Vice-President.

Q. Are you and she two of the owners of CEI?

A. Yes.

Q. You refer to your company as "CEI"?

A. We do. . . .

Q. And you had stated in your deposition, at Page 33, commencing at Line 8, "The cabinets were not constructed in accordance with the specifications. The materials used were not the materials specified in the drawers. I think that was—my best recollection that the way the drawers were constructed, they were constructed out of a laminated plywood and the specifications required that they be constructed out of solid stock material, and that was the reason they were holding the $80,000." And that was your answer on that day. Did you say that?

A. Same answer today, they were constructed out of material the manufacturer thought was superior, he thought man-made material was superior to solid stock, he had a lot of reasons, the architects didn't agree.

Q. And that was CEI's failure, was it not?

A. If you deem that a failure.

Q. And the problems that arose in connection with the elementary school in Conway were the subject of many local newspaper articles in the community, were they not?

A. There were a few articles. I don't know if "many" is characteristic.

Q. But there were some articles in the community; is that right?

A. There were some articles in a local newspaper.

Q. Would you agree that this school and the problems involved with it were the subject of common knowledge in the community?

A. No.

Q. And would you disagree if your wife testified otherwise in her deposition? Would you disagree with her testimony if she testified that it was the subject of general knowledge and reputation in the community?

A. I never disagree with my wife.

Q. So you'd agree with me in that respect?

A. In that respect, I do.

Q. Were there also plumbing problems on the job where the pipes in the school were placed overhead and froze and burst and caused damages?

A. The pipes were run overhead, they froze and burst.

Q. And that was in the winter of 1981; correct?

A. Yes.

Q. And the school sustained several thousand dollars in damages due to the pipes freezing; isn't that true?

A. I don't know if that's true. There was damage to the building. My company repaired the damage that we were aware of at no cost to the owners, but I am not aware of any other damage.

Q. Let's refresh your memory. On Page 35 of your deposition, commencing at Line 16, and we're referring to this problem with the water:

"Q. How much damage did it cause?

"A: Dollarwise, I don't know. I would say thousands of dollars.

"Q. Several thousand?

"A. Several thousand, something like that, maybe $5,000."

A. Your question was did I cause the school to spend that money, where my testimony referred to earlier in my deposition was that my company repaired that at no cost to the owner.

Q. My question was solely it cost $5,000 in damages.

A. You said did I cause $5,000 damage to the school, and I understood that to mean that they paid the 5,000. I'm sorry I didn't understand your question.

Q. The school sustained several thousand dollars in damage, did it not?

A. The building, not the school.

Q. The building did. Thank you. And that was the subject of articles in the local newspaper, was it not?

A. It could have been. I don't know.

Q. And there was also a problem with the windows in the school, were there not, where CEI did not install the proper safety glass?

A. There was a problem with the safety glass in the windows.

Q. And that was due to CEI's failure to follow specifications; isn't that true?

A. Yes. We had installed the glass in accordance with building codes and safety codes and it turned out that the specification was more stringent. And when the supplier installed them, we failed to recognize they didn't follow the specs instead of the code.

Q. And that was the subject of local newspaper articles in the Conway community, wasn't it?

A. No that I'm aware of.

Q. And there were instances where CEI improperly placed insulation in the school, were there not?

A. There were some areas of the ceiling that had some insulation missing.

Q. "Improperly placed," I believe, is the language used in your deposition.

A. I think that's fair, yes.

Q. And CEI also failed to properly install the ceiling tiles at the school, did it not?

A. No, I think they were properly installed.

Q. Well, let me refer you to your deposition again. On Page 38, commencing with Line 6:

> "Q. Were there ceiling tiles that were the subject of complaints by the school district?
>
> "A. I think that the specs require a hold-down clip to be installed in the T-grid and that the ceiling contractor had either not installed all of them or had done it in an improper manner or some such thing."

Is that your answer on that day?

A. Uh-huh, yes.

Q. And you are the contractor on the school.

A. I am the contractor.

Q. That is, CEI is.

A. CEI is or was.

Q. And these problems were all a subject of the local newspaper articles in Conway?

A. I don't want to leave it quite like that. You asked me if the ceiling tile was installed correctly and I thought I gave you a truthful answer both times. Are you saying I didn't do that?

Q. I'm moving on to the next question. These were the subject, all these problems, of the local newspaper articles?

A. I don't know about the newspaper articles, Mike.

Q. You don't know one way or the other.

A. You said there was a lot; I think there may have been some. I don't know specifically.

Q. As a result of these and other problems, the subcontractor filed a suit against CEI because CEI failed to pay it on the Conway school job; isn't that true?

A. Could you repeat the question?

Q. As a result of these and other problems that we've discussed here in the last few minutes, a subcontractor filed a lawsuit against CEI for failure to pay it on this contract; isn't that true?

A. Yes.

Q. And then CEI filed a Third-Party Complaint and brought the owner, the school district, into that litigation, didn't it?

A. Yes.

Q. And before the litigation was over, there were several parties involved in that litigation, several subcontractors and the owner and CEI; isn't that true?

A. That's true.

Q. And this was the subject of local newspaper articles in the community, was it not?

A. I think I already told you, Mike, about the newspapers. I don't know.

Q. This litigation involving this school that was built—commenced in 1980 was not finally settled until January of 1986, was it?

A. We worked out an agreement with the

school in 1982 for what would be required to settle up all the problems. One of the major subcontractors involved in that agreement entered bankruptcy in early 1983, and before we could sign all the agreements, the bankruptcy dragged on for years and years, we couldn't sign the agreements because the person that had agreed to it now had to defer to the bankruptcy court, and it just went on forever. So technically, the last paperwork that my attorneys attended to, I don't know when it was finished. But as far as the school was concerned, it was in 1982.

Q. But the school's attorney finally signed the Order of Dismissal, along with all the many other parties, and it was entered in January of 1986; isn't that true?

A. I don't know that to be true, Mike. It could very well be.

Q. Let me show you a document and see if you recognize that as the Order of Dismissal.

A. I've never seen that document, but I take your word for it.

Q. You know it was many years after the school started, the project started?

A. In 1982, we worked it out with the school. The bankruptcy dragged it on forever. . . .

MINUTES OF BOARD MEETING OF JULY 7, 1986

At a special meeting of the Board of Directors of the Conway Corporation on July 7, 1986, all members were present. Jim Brewer, Manager; Bill Hegeman, Manager of Finance & Accounting; and Bennie McCoy, President, Crist Engineers, Inc. were also present.

The purpose of this special meeting is to consider wages of hourly employees and alternatives concerning the water treatment plant project.

The Manager apprised the Board that the Arkansas Power & Light Company and the International Brotherhood of Electrical Workers had completed their negotiation efforts concerning wages. They agreed to a 3.75 percent increase in the wages of hourly employees. Historically, the results of this negotiation weighs heavily in the annual review of hourly employees and, in the absence of other significant criteria, the Manager recommended that this wage adjustment level be adopted by the Conway Corporation and the hourly employees of the Conway Corporation wages be adjusted upward by 3.75 percent. After some discussion in which it was pointed out that this would impact the cash flow of the Conway Corporation by $56,463.68 per year as it upwardly adjusts the salaries of 78 employees, a motion was made by Luke Gordy and seconded by

Larry Graddy to accept the recommendation of the Manager that this level of adjustment be retroactive to the first pay period in June. This motion received unanimous approval.

The Manager reviewed the events to date concerning the construction of the water treatment facility and accompanying bond issue, pointing up the recent acceptance of bids on the project, discussed capabilities and experiences of bidders, and recommended that the project move forward into the construction phase. It was pointed out that if the plant is constructed as designed and the alternative pipeline Schedule 2-B is constructed, a shortfall of funds in the amount of approximately $680,000.00 will exist. Two construction alternatives seem to be available. (1) Pipeline Schedule 2-A would reduce the fund need by $147,000.00. Additionally, it is believed that elimination of the sludge siphon assembly from the project would reduce the project cost by approximately $200,000.00. This assembly could be retrofitted later with an estimated 25 to 35 percent increase in the present cost.

Methods of covering the shortfall of funds include: (1) Another bond issue; (2) Using available reserve funds; and (3) Funding from anticipated cash flow surplus.

Information concerning the qualifications and experience of the two low bidders was reviewed. Mr.

McCoy reviewed a letter of July 3, 1986 in which he enclosed the resumes, financial references, experience records, etc. of the two low bidders on Schedule 1. A copy of that letter is attached to and hereby made a part of these minutes. Mr. Brewer read a letter from Mr. Carl Stuart, Superintendent of Conway schools, telling of his experiences with Construction Engineers, Inc. as the contractor constructing the Florence Mattison School. The Manager also told of a letter from Mr. John Echols, Friday, Eldredge & Clark Law Firm outlining the sources of funds available to fund this project. Copies of these letters are attached to and hereby made a part of these minutes.

After considerable discussion concerning this project, funding of the project, alternatives, and qualifications of the two low bidders on Schedule 1, the Manager made the following recommendation:

1. A contract for Schedule 1 be awarded to the second low bidder.

2. The Manager be authorized to negotiate a reduction in cost by eliminating the sludge siphon assembly after which a decision will be made to include or eliminate said system.

3. Contingent upon the decision identified in Paragraph 2, a selection of Schedule 2-A or 2-B will be made.

4. A contract be awarded to the low bidder on Schedule 2-A or 2-B.

5. The shortfall of funds be provided from a combination of reserve funds and anticipated cash flow surpluses.

After a rather lengthy discussion, a motion was made by Mr. Gordy and seconded by Mr. Clifton that the Board accept and approve the recommendation of the Manager. This motion received unanimous approval.

There being no further business requiring the attention of the Board at this time, the meeting was adjourned.

These minutes approved by the Board of Directors of the Conway Corporation on _____.

FRANK E. ROBINS, III
President

LUKE GORDY
Secretary-Treasurer

CRIST ENGINEERS, INC.
Consulting Engineers
Little Rock, Arkansas 72204
July 3, 1986

Mr. James H. Brewer, General Manager
The Conway Corporation
P. O. Box 99
Conway, AR 72032

Re: Expansion of Gleason Water Plant,
Conway AR
(Bids as Received June 26, 1986)

Dear Mr. Brewer:

Enclosed please find a Certified Copy of the Bid Tabulation of all bids as received on Schedule 1 (Water Plant Expansion) and Schedule 2 (24-in. Transmission Line) on June 26 at 1:30 PM.

We are well pleased with the number of bids received; and consider that there was certainly an adequate amount of competition in the bidding. It is our opinion that the bids as received reflect a true evaluation of the worth of the project. We do not believe that any significant savings could be generated by rebidding the project. There is usually a stigma associated with rebidding work that is a detraction; and typically less bids are received than in the initial bidding.

Further remarks are on the basis of the individual Schedules of the work:

SCHEDULE 1 (Water Plant Expansion)

Low Bid	Construction Engineers Inc. Russellville, AR	$3,885,900
2nd Bid:	M. D. Limbaugh Const. Co. Sikeston, MO	$3,952,000

Enclosed you will find complete Resumes, financial references, experience records, etc. pertinent to both of the above construction firms.

I have contacted references as given by both of the above contractors. Following is a synopsis of remarks made by the references for each of the contractors:

Construction Engineers, Inc.

Tries hard to do a good job—quality of work usually good. One Reference reported lack of good superintendency on project. Work seems to go well when Steve Smith (Owner) is running job personally. Smith sometimes has inclination to try to "improve" on the plans. Good administratively, but office staff sometimes controversial. One Referenc

stated that a "paper war" resulted when Smith failed to meet critical mileposts on project and time extension was requested.

Surety reported that Construction Engineers, Inc. was not extending bonding capacity to the limit if awarded this contract.

Architect for Conway school project several years ago stated Construction Engineers, Inc. was not responsible for the deficiencies of their Subcontractors; and expected the Owner and the Architect to deal with his Subcontractors directly. (This Architect stated that this was the worst experience he had ever had in this respect!)

M. D. Limbaugh Construction Co.

I talked to 5 references pertaining to Limbaugh. The consensus was overwhelmingly an *excellent report.* Firm is well experienced, well staffed with experienced personnel, and very responsible. (One Reference stated that there was a problem with a Superintendent on a project; and Limbaugh immediately replaced him with a very capable individual).

I have discussed Limbaugh with several

Vendors who typically quote water and sewerage projects. All stated that Limbaugh was an excellent contractor and very responsible in business dealings.

You can judge from Limbaugh's Resume that the firm is very substantial financially. (Note particularly the letter of June 27 from Mitchell Insurance concerning Limbaugh's bonding capacity.)

Schedule 2-A (24-in. Transmission Line):

Low Bid: Sch. 2-A:	Key Co. Inc. of Arkansas Pine Bluff, AR	$88,739.40
Low Bid: Sch. 2-B:	Diamond Const. Co. North Little Rock, AR	$235,556.77

Key Company is of known reputation to us. On May 20, 1986, a contract was awarded to them at Malvern for the installation of approx. 3,800 feet of 12-in. water main in the amount of $65,420. We are the engineers for this project. I checked references on Key Company prior to award of this contract at Malvern; and found them to be well experienced and of good reputation as utility contractors. They have performed well on this project at Malvern; and the new water line has been completed and is being tested today. We would have no reservation in awarding a contract to Key Company if it is your decision to do so.

Diamond Construction Co. is a subsidiary of DANCO Const. Co. I am certain that DANCO is of known reputation to you personally. They are one of the largest utility contractors in the State, and have undertaken many of our projects in the past. (Their most recent project for you at Conway was the sanitary sewer extension to The Conway Center at a cost of approx. $195,000.) We would have no reservations what so ever in awarding a contract for Sch. 2-B to Diamond Const. Co. if it is your decision to do so.

Summarily, we would recommend contract award to either of the low bidders on Schedules 2-A and 2-B; depending upon your ultimate decision concerning the route of the transmission line and the implications on the over-all project budget.

Engineers' Recommendation:

Schedule 1 (Water Plant): Reject the low bid for cause, and offer the contract to Limbaugh Construction Co. in the amount of $3,952,000. If in the final analysis it is necessary to reduce the gross project budget, negotiate with Limbaugh for the removal of the sludge siphon system as discussed in conference with you and your staff on the afternoon of June 30th. (We estimate that $200,000 or more can be saved by this deletion and not seriously disturb the overall performance of the plant. The sludge siphon

withdrawal system can be readily retrofitted at a later date.)

If you desire to implement the removal of the sludge siphon system from the contract with Limbaugh, we are prepared to negotiate with him such that a deductive Change Order can be implemented concurrently with the contract award.

Schedule 2 (Transmission Line): We would recommend contract award to either Key Company for Sch. 2-A, or to Diamond Construction Co. for Sch. 2-B. This decision rests with you dependent upon the functional advantages of either of the pipeline routes; and the implications on the overall project budget.

This has been an effort to concisely state our professional opinion regarding the award of the contracts for this Project. We will meet with you and your Board of Directors upon your invitation for further discussion and elaboration.

Sincerely yours,
CRIST ENGINEERS, INC.
BENNIE J. MCCOY, P.E.
President

CONWAY PUBLIC SCHOOLS
Office of the Superintendent
Conway, Arkansas 72032
June 30, 1986

Mr. James H. Brewer
Conway Corporation
Conway, Arkansas 72032

Dear Jim:

Our problem with Construction Engineers, Inc., as I recall the matter, had to be in the organization of the company. The company acted as a jobber for the sub-contractors in all work areas. The only people employed by CEI were the owners and a building foreman.

The contractor expected the building owner and the sub-contractors to work out any problems that arose. The school district had problems in getting the building finished. It seemed that everyone was involved in a law suit, everyone suing each other, including sub-contractors, contractor, school district, and architect.

Sincerely yours,
CARL STUART
Superintendent

Masters

(e)(2) Effect. The court shall accept the master's findings of fact unless clearly erroneous. Within 20 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

No. 89-1306

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1989

Construction Engineers, Inc., Associated General Contractors of America, Arkansas Chapter, Michael Sutterfield and Catherine N. Rushing,

Petitioners

v.

The Conway Corporation, M.D. Limbaugh Construction Co., Jim Brewer, Bennie J. McCoy,

Respondents.

REPLY TO RESPONDENTS' JOINT BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioners set forth a designation for corporate relationships in the Petition for Writ of Certiorari. In accordance with Rule 29.1, said list is incorporated herein. No amendment to this list is necessary.

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TABLE OF AUTHORITIES

SECONDARY AUTHORITY

No. 89-1306

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REPLY TO RESPONDENTS' JOINT BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The issue presented by the petitioners seeking redress from this Court, is the denial of the fundamental right to fair trial, that is, the right to confront witnesses, to cross-examine, to object to inadmissible testimony. The issue extends beyond this case and its facts. In its original opinion, the Arkansas Supreme Court states it is relying on proffers of proof, submitted after trial was concluded, in its *de novo* review of the case and its new findings of fact. After this error was pointed out to the court on petition for rehearing, the court states in its substituted opinion, it is not clear to the court whether it may consider such proffers

in its *de novo* review. Thus, litigants in the State of Arkansas will continue to be deprived of fundamental rights if the petition for writ of *certiorari* is not granted.

Turning to the facts of this case, petitioners have shown they are entitled to relief from this Court. They have demonstrated the trial record does not support the findings made by the Arkansas court in its *de novo* review. Only by resort to the proffer of proof can support for the court's fact finding be found. Although respondents attempt to glean some support in the trial record for the Arkansas court's findings, respondents do not address the real issue, that is, the fact the Arkansas court originally granted relief upon the post trial proffer of proof and will continue to rely on such extra judicial offers in future cases. As stated in *Application of Gault*, 387 U.S. 1, 19, 20, 21, 18 L.Ed.2d 527, 542, 87 S.Ct. 1428, 1439, 1440 (1967):

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility of truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science." (Footnotes omitted)

It is beyond traverse that guarantees of right to counsel, confrontation and cross-examination are applicable to state proceedings. *Application of Gault, supra; Douglas v. State of Alabama*, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965).

Respondents' brief in opposition seeks to divert the Court's attention from the fact the court below relied upon the proffer of proof as evidence. Respondents would have this Court believe the trial record supports the findings in the *de novo* consideration of the case. It is important to note that the reliance by the Arkansas court on the proffer was essential in order for the "record" to demonstrate good faith on the part of respondents. The trial record and fact findings of the trial court upon the evidence in the whole case demonstrate bad faith on the part of respondents insofar as their actions and intent to reject the low bid on the publicly funded project. The finding of bad faith supported the monetary award made by the chancery court to petitioner.

First, while the *proffer* states CEI was a subcontractor and Conway Corporation was the general contractor on a prior construction project for Conway Corporation, respondent asserts the proposition that the trial evidence also supports the Arkansas court's finding. To support that position, respondents' Appendix at A15-16 is called to the Court's attention. The reference states that respondent Conway Corporation *furnished materials* for the project. The reference does not contain any material with regard to any party being a general contractor or subcontractor. A statement such as is found here, that an owner only supplied materials, is the opposite of stating the owner was the general contractor. 17 *C.J.S. Contracts* §11 (1963); *See, Executive House Bldg. Inc. v. Demarest*, 249 So.2d 405, 411 (1971); *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E.2d 710, 712 (1977); *See, also, Arkansas Contractors Licensing Bd. v. Butler Construction Co. Inc.*, 295 Ark. 223, 748 S.W.2d 129 (1988). While there is no question in the record that the

owner, Conway Corporation supplied the materials, there is also no question in the record that petitioner Construction Engineers, Inc. was the contractor who built the project. As set forth in the supplemental abstract, the project was approximately a $250,000 project. The contractor's portion to do the job was approximately $32,000.00. (Supp. App. A-3) Only the proffer supports the Arkansas court's finding. The Arkansas court's reliance on the proffered testimony materially affected the outcome of the case. The court cited this issue as one of the "Three Factors . . . crucial to the chancellor's decision." (App. A-9 to the Petition)

Second, respondents' attempt to demonstrate the record supports the Arkansas court's statement that the handwritten note relied upon by respondent McCoy as part of his investigation, were written for his personal use in preparing for deposition, rather than documents stated by McCoy to be written contemperaneously with the events. The significance of the distinction is, if McCoy's testimony at trial was that the notes were written contemperaneously with the events, that fact would support the trial court's finding, the first of the three factors stated by the Arkansas Supreme Court to be crucial, as to lack of credibility and the finding of an improperly conducted investigation of the low bidder. Respondents cite material on A-11 and A-12 of the brief in opposition which describes *two* sets of documents. The "notes" described on A-11 and A-12 refer to *handwritten notes* (Supp. App. A-5 - A-8) The trial record of McCoy's testimony clearly states these handwritten notes were written contemperaneously with the events. For example, the material in Supp. App. A-6 states:

> Q: I don't want to trick you here, Mr. McCoy. I want you to answer very carefully. Did you have that visit, according to your testimony, on 6/30/86 and did you write those notes on 6/30/86?
>
> A: Yes, that is my testimony. This visit with Mehlburger Engineers was 6/30/86. (Tr. 2438)

The material referred to by respondents is a *typewritten* log (Supp. App. A-12, Ex. 28) and is not the document described by the chancellor or the witnesses when the witness testified the document was made contemperaneously with the events. The material in the supplemental appendix A-3 - A-7 demonstrates one of the credibility problems of respondent McCoy which the Arkansas court defended with its statement that the documents were prepared for deposition. The supplemental appendix A-14 - A-15 contains the handwritten notes of McCoy regarding his visit with the engineers at their offices to review plans and discuss CEI's qualifications with the engineer. The date shown is June 30. The testimony at trial shown by supplemental appendix A-6 - A-7 by McCoy asserts the visit to the engineers to be between May 19 and seven to ten days later, or on May 26 through 30. In order to explain his actions at trial, it was necessary for McCoy to place the visit in the engineer's office to be between a telephone call of May 19 and a second telephone call seven to ten days later. The June 30 date on McCoy's own documents impeaches his testimony and *vice versa*. The record simply contains no facts to support the Arkansas court's findings that the document was prepared for deposition purposes.

Third, respondent misstates the problem with the Arkansas court's findings set out on Page XIII on the Petition. It is not the *source* of the information as stated by the Supreme Court which is not supported by the trial transcript, but the information itself. The Arkansas court found that "According to Brewer's information . . ." there were problems with the school built in 1981-1982 "including problems with *plumbing, cabinet work* and *windows* as a result of *faulty construction*." (Emphasis Added) The *proffer* supports these findings by the Arkansas court as to the nature of the problems, the finding of faulty construction and the fact that Brewer was aware of these problems at the time decisions were being made which

would reflect upon his intent. The trial record does not support these findings either as to the problem or faulty construction or Jim Brewer's knowledge of the problems. In the material cited by respondents in respondents' appendix at A-13, A-18, no reference is made to problems with *plumbing, cabinet work, windows* or *faulty construction.* The proffer, on the other hand, does state there were problems with these items and asserts Brewer's knowledge of these matters. The court's finding in this regard are part of its general findings. The use of the proffer as part of the Arkansas court's general findings demonstrates the extent to which the improper information is used. It appears in one form or another throughout the opinion. In fact, as shown by the trial record, respondent Brewer never testified as set forth in either the proffer or the court's finding with regard to knowledge of plumbing problems or cabinetry problems or window problems or faulty construction.

While respondents assert the problems described in the proffer are true, the issue is not whether some other witness had knowledge of these matters, but whether respondent Brewer did! It was Brewer's intent, his bad faith or good faith, which was at issue. If he had no knowledge at the time decisions were made, that would affect the finding of bad faith/good faith. In truth and in fact, however, although respondents cite Steve Smith's testimony as supporting problems with the old school, the material referred to at respondents Supp. App. A20-A29 does not support the assertion there were, in fact, problems attributable to CEI as general contractor.

Fourth, respondents misstate the nature of the Arkansas court's findings and the lack of support in the trial transcript with regard to whether the board to the Conway Corporation felt that CEI could not complete the project on time. Respondents perceive the problem, as stated on Page 7 of their brief, as to whether a challenge is made by Petitioners to the court's finding as to whether the vote was unanimous or not. No issue ever existed as to that point.

The court's finding which is unsupported, is that the board had information or belief as to whether or not CEI could not complete the project on time and that the second low bidder could. Specifically, as set forth on Page XIII of the Petition, the Arkansas court found "After hearing Brewer's information and recommendations, the members were unanimous in their conviction that the job *could be completed on time with Limbaugh but not with CEI.*" (Emphasis Added) It was the court's finding in this regard which does not find any support in the record. While the proffer does not directly support the fact finding of the Arkansas court, the inference from the proffer is such as to support the court's fact finding. It is obvious to anyone who reads the proffer of proof and the Arkansas Supreme Court's finding that the court has in fact relied upon the proffer in making its decision. A trial *de novo* conducted in this manner denies a litigant the opportunity to confront witnesses, cross-examine or object to inadmissible testimony, all considered fundamental to our system of justice. The error here is of sufficient constitutional magnitude on the facts of this case that the Petition for Writ should be granted.

CONCLUSION

It is important this Court issue a Writ of *Certiorari* to the Arkansas Supreme Court to protect litigants' right to fair trial. Petitioners respectfully suggest the error is so obvious a summary reversal is proper. In the alternative, however, Petitioners respectfully submit the writ should issue and argument be allowed to protect the right of Petitioners to fair trial.

Respectfully submitted,

DAVID A. ORSINI
Counsel of Record
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Little Rock, Arkansas 72201
(501) 376-4242
Attorney for Construction Engineers, Inc.

JANICE VAUGHN
Attorney for Associated General Contractors of America, Arkansas Chapter

JAMES D. RHODES
Attorney for Michael Sutterfield and Catherine N. Rushing

SUPPLEMENTAL APPENDIX

TESTIMONY OF STEVE SMITH IN THE PROCEEDINGS BEFORE THE SPECIAL MASTER

Steve Smith, having been previously duly sworn on oath, testified as follows:

Q. Let's stop right there. You'd done some work on the Gleason water plant. What year are we talking about?

A. 1984.

Q. What did you do in 19—was the Gleason work done for Conway Corporation?

A. It was.

Q. Who were the engineers?

A. Crist Engineers.

Q. Did you work on the Gleason plant, itself?

A. I did.

* * *

Q. For the City of Conway on that project, was some of the work that you did very critical?

A. Yes, the nature of the work required that we cut the main—what we call the force main pipe, the pipe that leads from the water treatment plant to the city's water supply—it required that we cut or interrupted service at least twice during the construction project, and it meant essentially that we totally isolated the city from its supply of water, and it depended on our skills and ability to restore the service before they ran out of water.

* * *

A. This is a photograph of some of the work we did outside the filter treatment plant, and in order for this larger pump to pump into the line—the pump is located in the basement of the building—and in order for this pump to fit into the line, we had to cut this line that feeds all the water out to the City of Conway. And this is the new piece of pipe that we installed in there. It's about a 14-inch diameter pipe and this is what we call a 'T'. We went in with some saws and cutting devices and cut the main line, sat in the new larger pieces, and restored it.

During that time, the city's water needs was supported out of the reservoir of water in one of those elevated water tanks. Mr. McCoy had told us exactly how long we had based on his estimates of use, and I can't remember if it was an hour or two hours, something like that, before the city ran out of water. So this operation had to work pretty smoothly without any hitches or the city would run out of water. I have some drawings that go into more detail. There's another cut we made inside the plant. It didn't photograph as well. And this is one of the large pumps that we installed and things like that.

Q. For the record, the document you've been referring to is part of a brochure your company uses, is it not?

A. It's part of one of our advertising brochures, yes.

Q. And that water line which you were showing his Honor right there, is that the main water line of the City of Conway?

A. That's the force main that feeds the City of Conway.

Q. As a result, Mr. Smith, of your work on that project, did you receive some letters that made a comment on your work from Crist Engineering or anybody?

A. Yes, I received letters both from the owner and from the engineers regarding our work on the project.

Q. Were they complimentary, not complimentary, or what?

A. I viewed them as complimentary.

* * *

A. I think McCoy mentioned in his deposition he thought the overall value of the project, including all the material purchased by the owner, might be somewhere near a quarter of a million dollars. My contract, which was to install all that material and provide the labor and some minor material, was around $32,000.

Q. It was a $32,000 project?

A. Not a project, a contract for $32,000. It was a quarter of a million dollar project and a contract for $32,000.

Q. For CEI.

A. For CEI.

* * *

TESTIMONY OF
BENNIE J. McCOY

Bennie McCoy, having been previously duly sworn on oath, testified as follows:

Q. For instance, by looking at plans, you could not tell the quality of work being done, could you?

A. No, but I could talk to the engineers.

Q. But what you found out up there was the quality of work was not a problem, didn't you?

A. That's true, they said that, you know, the ultimate finished product on this particular project, the quality was generally good.

Q. In fact, I believe you stated you weren't even questioning the quality of work were you?

A. At what point in time?

Q. Well, at the time of your telephone call to Mehlburger and at the time of your visit up there.

A. Was I questioning the quality?

Q. The quality of work that CEI performed in general, not just on that project.

A. In my conversations with the Mehlburger engineers, we explored that and they made the comment that the quality was generally good.

Q. Have you ever questioned the quality of work of CEI?

A. Have I ever questioned the quality of work?

Q. Of CEI? Was that an issue? From your investigations, have you found that they do quality work?

A. You recall that my experience with CEI related to the little Gleason project and I stated that we found that project to go generally well, in our opinion, as the engineers. And from what the Mehlburger people told me, they found the quality to be generally good.

Q. Look at your deposition, if you will. Look at Page 48. Look at Line 20. Do you see that? Have you found that?

A. Line 20.

Q. "Could you, from anything you did there, tell the quality of work being performed by the general contractor?" Answer, "The quality of work was not being questioned. In other words, it had been related to me that, you know, when you—when you analyze the ultimate complete end project as a product as constructed by CEI, that the workmanship was good."

THE COURT: Mr. Orsini, he's been saying that since 3:20 that the quality of the work was good. I understand that. Let's move on to something other than the quality of work on the Morrilton job.

* * *

Q. Would you look at a document I have there in front of the book. I believe it's Plaintiff's Exhibit 28. And I'll ask you if you recognize that.

A. Yes, sir, I recognize it.

MR. ORSINI: I'm checking my notes, your Honor, I find that it's already been introduced as Plaintiff's Exhibit 28.

Q. Mr. McCoy, the first page of this Exhibit 28, is in part of your own business records?

A. Yes, it is.

* * *

Q. Look at the second page. Do you see the pencil-written notes?

A. Yes, those are my notes.

Q. Do you see the date 6/30/1986?

A. Yes.

Q. Is that the date you testified—do you testify that that's the date that the notes were made?

A. Yes, that's the date of my visit with the Mehlburger engineers and these are notes of that visit.

Q. I don't want to trick you here, Mr. McCoy. I want you to answer very carefully. Did you have that visit, according to your testimony, on 6/30/86 and did you write those notes on 6/30/86?

A. Yes, that's my testimony. This visit with Mehlburger engineers was 6/30/86.

Q. How many visits did you have with Mehlburger engineers that you actually went to their office to inquire about the Morrilton project?

A. I had one visit with Mehlburger engineers.

Q. Is it your testimony from this document that this is the date of this?

A. Yes, this is my testimony that I visited them on June the 30th, '86.

Q. The two telephone calls you had, the first with Danielle Smith and the second with Steve Smith, were both back in mid-May, were they not?

A. Telephone conversation with—the initial telephone conversation was May the 19th.

Q. And that was with Danielle Smith?

A. That was with Danielle.

Q. And the follow-up conversation was with Steve Smith about a week later?

A. A week or ten days later, something in that range.

Q. And those early phone calls were made with the purpose to dissuade or pursuade them not to bid; right?

A. The early phone calls.

Q. Yes. And whatever investigation you did during the period was also made for that purpose, was it not?

A. Investigation at that point in time was essentially to verify in my mind the relation—the information that had been relayed to me by Mr. Brewer. In other words, was simply trying to put Mr. Brewer's remarks with some degree of clarification on my part.

Q. Look at those notes here. That's your handwriting is it not?

A. These are absolutely my notes, Mr. Orsini.

Q. They are the recollection you chose to write at the time with regard to this Larry Lloyd/Fred Oswald visit.

A. Yes.

Q. Look at the next page of the notes. Do you see those?

A. Yes.

Q. Those having to do with conversations you had with Bill Graham?

A. Yes, sir.

Q. And reflect the results of your investigation there.

A. Yes.

Q. And I also notice the very first page, Paragraph 5.

A. Yes.

Q. What is this first page? It's typewritten. What does it purport to be?

A. It was a log that I prepared to organize my thoughts and develop some chronology prior to your taking of my deposition.

Q. Look at Paragraph 5.

A. Yes, sir.

Q. BJM; is that you?

A. Yes.

Q. You have written there, "BJM called Bob Threet reference on CEI pertaining to the Morrilton water project and CEI's work at the intake structure at Brewer. Threet said CEI had done poorly erecting structure." Then you say, in parentheses, "No not of this conversation." Are you saying that this engineer – Bob Threet, is an engineer, is he not?

A. Yes, sir.

Q. It's your testimony today that's what he told you?

A. That's my testimony, that Bob Threet related to me that they'd had some problems with a small structure on this particular project for the Morrilton water project, as it's called here, Morrilton water district.

TESTIMONY OF DAN STOWERS

Dan Stowers, having been previously duly sworn on oath, testified as follows:

Q. I'm just asking, did you issue the certificate of substantial completion—

A. That's when the owner accepted it.

Q. Did you issue a certificate of substantial completion to cover those two buildings?

A. I'm not certain that those were executed.

Q. They were executed by you, were they not?

A. No one else signed them.

Q. But they were executed by you, were they not?

A. It's my job to sign the substantial completion as agreed on between the owner and the contractor. I signed it, the other two parties never executed the document.

Q. But as far as you and the school, you, speaking for the school as architect, you signed it in August and then also September 2?

A. I don't think it's a document until all parties sign it. You don't have a change order until all three parties sign it.

Q. But on behalf of the school, you signed the certificate of substantial completion on one building in August and one building on September 2?

A. Certainly I signed it.

Q. Okay. Now, you mention there were four or five subcontractors that did not perform well?

A. Correct.

Q. Are these the ones that got involved in the litigation between the school and CEI and themselves?

A. Your central mechanical contractor was one; Russ-Ark was the other, that was the cabinets; and Allied Glass—was it Allied Glass? —anyway, the contractor for the glass company who furnished the glass, that was another one; and the ceiling, which was King out of Searcy. Freddy King is the owner.

Q. These were the ones involved in litigation?

A. Not all of them. I think Central and Russ-Ark were probably the two, that I recall.

Q. What about Freddy King?

A. He may have been a party to that.

Q. Do you remember being in a meeting with Freddy King and his lawyer?

A. True.

Q. In each one of those cases, wasn't there a dispute, Mr. Stowers, over the specifications you had drawn on the project?

A. That's correct.

Q. And litigation arose from that?

A. Yes, sir.

Q. Didn't you take the position that all of those disputes and problems were the general contractor's fault, or something that he should have resolved, but anyway, he was at fault and not you?

A. It's part of his task to perform. It's under his contract.

Q. And you've laid all of those problems at his doorstep?

A. That's what he gets paid for.

Q. This project caused you, personally, a lot of financial loss, has it not?

A. No, sir.

Q. How long had your architectural firm been doing the major work of the nature that you do for the school district prior to 1984?

A. You know, that pleases me very much because we were able to hold the contract and were the school's architect since 1963.

Q. And you were able to do the majority of that work of substantial projects without bid with the school district, weren't you?

A. All architect projects are not on a bid basis, yes, sir. It's a commission.

Q. But after this business about the school, the next school building they built up there, they put it out for bids, didn't they?

A. They did, yes.

Q. And you were not the successful bidder, were you?

A. That's correct.

Q. Didn't you at that time blame your problems then on CEI?

A. No, as a matter of fact, I didn't. My personal feeling is that I still feel that CEI does not protect the owner from their subcontractors, and I appreciate the experience because, as I stated, it made a better architect out of me. That experience with having to deal with a lawyer such as yourself kind of opened my eyes to some of the things that I wasn't doing in my company.

Q. Well, when you were up there making your presentation in competition with other architects to do the new work, did you talk to a newspaper reporter and, in the course of that, did you blame your problems of Florence Mattison on the contractor?

A. That's true.

Q. You did that. Did you do that in front of the board up there, blame your problems on the contractor?

A. You bet.

Q. And you lost that bid, didn't you? Didn't you?

A. I didn't do that project, no.

Q. Has that created a lot of hard feelings between you and the contractor?

A. Not particularly. I just can't recommend them.

PLAINTIFF'S EXHIBIT #28

LOG

McCoy's Conversations with References for CEI:

1. *May 16, 1986 (or there about):*

After conversation with Jim Brewer concerning CEI & Brewer's concerns about them; BJM called Jim Tanner at *Mehlburger Engineers* concerning Morrilton STP Project. Tanner referred BJM to *Larry Lloyd* Lloyd's remarks concerned missed mileposts, potential time overrun, and used the phrase "paper war" between Engineers and CEI. Lloyd described to BJM the general character of the Morrilton project. Said superintendency was sometimes deficient, but job seemed to go well when Steve Smith was on job personally.

2. *June 30, 1986 (A.M.):*

BJM visited in *Mehlburger's* offices and talked to *Larry Lloyd* and *Fred Oswald* concerning CEI, and particularly their Morrilton S.T.P. project. BJM had opportunity to critically review plans for Morrilton project. Larry Lloyd reiterated remarks made in conversation of May 16.

(Larry Lloyd also gave excellent reference for LIMBAUGH, who had been the contractor for their Augusta, AR S.T.P. project.)

3. *July 3, 1986:*

BJM called Bill Graham for reference on CEI based on his experience with them on Mayflower sewer project. (See handwritten memo of 7-3-86 pertinent to this conversation.)

4. *July 3, 1986:*

BJM called Danny Stowers- Architect for reference on CEI pertaining to the Florence Mattison School project in Conway. Stowers' response was "worst" experience ever". (See handwritten memo of 7-3-86 pertinent to this

conversation.) This confirmed all of Jim Brewer's remarks.

5. *July 3, 1986 (or there about)* ;

BJM called Bob Threet for reference on CEI pertinent to the "Morrilton Water District" project, and CEI's work at the intake structure at Lake Brewer. Threet said CEI had done poorly erecting a small structure. (No notes made of this brief conversation.)

(THE ORIGINAL PORTION OF THIS EXHIBIT WAS HANDWRITTEN NOTES)

Larry Lloyd } Re: Construction
Fred Oswald } Engineers 6-30-86

Mehlberger Engineers BJM

Morrilton: ($3,500,000)

C/E - Conc., pumps, (screw pumps)
Danco - Piping - ($500,000)
Lagoon (85 ac.) - McGeorge (I $1,000,000)
H & H Elect. - ($450,000)

Office & Admin. - OK
Professional, Good Shop Dwg. Procedure

Field Supt.: Mike Clark - ?

1st Mi/Stone - Nov.
2nd Mi/Stone - Feb. - Time Ext. Request.

Comp. Date: July 12, '86 (12 mo. allowed)
Time Ext. anticipated - probably will be approved.

7-3-86
BJM

Bill Graham: Good Boy - Tries to do right—
Re: C/E !Can improve on Engineer's idea-!

Ladies in office - worrysome about progress payments - Some controversy, *Good Work - Good Quality!*

Charles Cooley: Re: *Limbaugh* - Bartlett, TN

Gregory Grace & Asc's. Competent, Reliable - Smart Good People —

7-3-86
BJM

Re: Construction Engineers:
Danny Stowers: (Worst experience ever!)
Men or equipment lacking—
Not responsible for subcontractors
$1,500,000 Conway School —